

No. 10662

United States
Circuit Court of Appeals
For the Ninth Circuit.

WELLS FARGO BANK & UNION TRUST CO.,
Executor of the Estate of Ben F. Sternheim,
deceased,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

Transcript of the Record

Upon Petition to Review a Decision of the Tax Court
of the United States

FILED

FEB - 8 1944

PAUL P. O'BRIEN,
CLERK

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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APPEARANCES:

For Taxpayer:

F. M. McAULIFFE, ESQ.,

L. C. BAKER, ESQ.,

For Comm'r:

HARRY R. HARROW, ESQ.,

DOCKET No. 111776

ESTATE OF BEN F. STERNHEIM, deceased,
WELLS FARGO BANK & UNION TRUST
CO., Executor,

Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

DOCKET ENTRIES

1942

July 7—Petition received and filed. Taxpayer notified. Fee paid.

July 8—Copy of petition served on General Counsel.

July 7—Request for Circuit hearing in San Francisco, California filed by taxpayer. 7-8-42
Granted.

Aug. 5—Answer filed by General Counsel.

Aug. 7—Copy of answer served on taxpayer, San Francisco, California.

1943

Jan. 5—Hearing set Feb. 1, 1943 in San Francisco, California.

Feb. 2—Hearing had before Judge Smith on the merits. Submitted. Petitioners brief due 3-21-43. Respondents 4-25-43. Reply 5-20-43.

Feb. 24—Transcript of hearing 2-2-43 filed.

Mar. 15—Brief filed by taxpayer. 3-15-43 Copy served on General Counsel.

Apr. 21—Reply brief filed by General Counsel. Served 4-22-43.

May 11—Reply brief filed by taxpayer. 5-11-43 Copy served on General Counsel.

June 24—Memorandum findings of fact and opinion rendered, Smith, Judge. Decision will be entered under Rule 50. 6-25-43 Copy served.

Aug. 14—Computation filed by General Counsel.

Aug. 18—Hearing set Sept. 15, 1943 on settlement.

Sept. 2—Consent to settlement filed by taxpayer.

Sept. 3—Decision entered, Murdock, Judge. Div. 3.

Nov. 9—Petition for review by U. S. Circuit Court of Appeals, 9th Circuit, with assignments of error filed by taxpayer.

Nov. 9—Proof of service filed by taxpayer.

Dec. 11—Certified copy of an order from 9th Circuit extending time to 1-19-44 to prepare and complete record filed.

Dec. 14—Statement of points filed by taxpayer with proof of service thereon.

1943

Dec. 14—Designation for record on review filed by taxpayer with proof of service thereon and agreed to. [1*]

United States Board of Tax Appeals

Docket No. 111776

ESTATE OF BEN F. STERNHEIM, deceased,
WELLS FARGO BANK & UNION TRUST
CO., Executor,

Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

PETITION

Estate of Ben F. Sternheim, deceased, Wells Fargo Bank & Union Trust Co., Executor, petitioner above named, hereby petitions for a redetermination of the deficiency set forth by the Commissioner of Internal Revenue in his Notice of Deficiency dated April 29, 1942, bearing the symbols San Francisco, IRA:ET:90-D CSW, and also MT-ET-10384—First California, and as a basis for its petition alleges the following:

1. Wells Fargo Bank & Union Trust Co. is a corporation organized and existing under and by

*Page numbering appearing at top of page of original certified Transcript of Record.

virtue of the laws of the State of California, with its principal place of business in the City and County of San Francisco, said State, and its address is No. 4 Montgomery Street, San Francisco, California. Said Wells Fargo Bank & Union Trust Co. is the duly appointed, qualified and acting executor of the last Will and Testament of said Ben F. Sternheim, deceased, [2] having been appointed by decree of the Superior Court of the State of California, in and for the City and County of San Francisco, dated May 2, 1940, in proceedings pending in said Superior Court entitled "In the Matter of the Estate of Ben F. Sternheim, also known as Benjamin F. Sternheim, also known as B. F. Sternheim, deceased", and numbered 83929 in the files and records of said court.

The return in question was filed with the Commissioner of Internal Revenue for the First District of California.

2. The Notice of Deficiency, with the statement which accompanied the same, was mailed to petitioner on April 29, 1942, and a copy of said Notice and statement is attached hereto and marked Exhibit "A".

3. The taxes in controversy are Federal Estate taxes. The amount in controversy is \$54,167.93.

4. The determination of tax set forth in said Notice of Deficiency is based on the following errors:

(a) The Commissioner of Internal Revenue erred in determining that the deductions claimed under Items 1 to 7 inclusive of Charitable, Public

and Similar Gifts and Bequests, Schedule N of petitioner's return, representing the value of remainder interests passed to charitable, public or educational organizations, under the terms of a revocable trust created by the decedent, Ben F. Sternheim, on June 9, 1938, and under the terms of the testamentary trust created by the last will and testament of said decedent, were not proper deductions.

(b) The Commissioner of Internal Revenue erred in determining that by reason of the power given to the trustee in said revocable trust and said last Will and Testament in the [3] uncontrolled discretion of the trustee to use and apply such part of the principal of each trust estate as the trustee may consider suitable or necessary in the interest and welfare of the individual life beneficiaries in the event of sickness, accident, want or other emergency of or to any of said individual life beneficiaries then receiving the income from the trust estate or from any portion thereof, provided that not more than ten per cent (10%) of the portion of the principal of the trust estate held for any such individual life beneficiary shall be used or applied in any one year for such purposes or any of them, conferred upon the trustee the power to divert the whole of the bequests, devises and gifts to uses and purposes which would have rendered them not deductible had they been directly so bequeathed, devised or given by the decedent.

(c) The Commissioner of Internal Revenue

erred in determining that because of the power conferred upon the trustee hereinbefore mentioned, the beneficial interests of the charitable, public or educational organizations are not severable from the interests in favor of the private uses and are not presently ascertainable.

(d) The Commissioner of Internal Revenue erred in determining that the power conferred upon the trustee, hereinbefore mentioned, operates to deprive the estate of the decedent of the right to deduct the value of the remainder interests to charitable, public and educational organizations named in each of the trusts in determining the amount of estate tax payable on account of the death of said decedent. [4]

(e) The Commissioner of Internal Revenue erred in not allowing a deduction for alleged income tax deficiencies and interest accrued thereon heretofore determined by said Commissioner of Internal Revenue as owing at the date of the death of the decedent;

(f) The Commissioner of Internal Revenue erred in not allowing a deduction for Federal Estate tax deficiencies and interest accrued thereon upon the estate of Rosie Sternheim, deceased, mother of said decedent Ben F. Sternheim, heretofore determined as owing by said Ben F. Sternheim, deceased, as transferee, at the date of his death;

(g) The Commissioner of Internal Revenue erred in not allowing a deduction for additional fees charged against said estate of said decedent,

Ben F. Sternheim, by the executors and attorneys of said estate;

(h) The Commissioner of Internal Revenue erred in not increasing the deduction taken in schedule (g) of the Estate Tax return heretofore filed on behalf of said estate for the charitable remainder created by the transfer during the lifetime of Ben F. Sternheim, deceased, in the amount of the proper proportion of the sum of \$392.08 representing dividends on four life insurance policies payable to the trustee of the revocable trust created by said decedent on June 9, 1938, as set forth in subdivision (b) of the statement attached to said Notice of Deficiency;

(i) The Commissioner of Internal Revenue erred in failing to allow a credit for inheritance taxes paid to the State of California, as provided by Section 813(b) of the Internal Revenue Code.

[5]

5. The facts upon which the petitioner relies as the basis for this proceeding are the following:

(a) The net income from the trust estates under said revocable trust and said last Will and Testament will be sufficient to provide for all probable needs of the life beneficiaries without the necessity of resorting to principal under the power conferred upon the trustee as hereinbefore mentioned;

(b) The provisions of said revocable trust and said last Will and Testament do not authorize resort to principal upon the request, direction or desire of any life beneficiary, nor is it mandatory upon the trustee under either of said trusts that

any payment of principal be made to any beneficiary. On the contrary, resort may be had to principal only in the exercise of uncontrolled discretion by the trustee, and the purpose for which said withdrawals may then be made is limited to the case of sickness, accident, want or other emergency.

(c) The amount of principal which may be used for the designated purposes is limited in any one year to ten per cent of the value of the trust estate. Said value is determined as of the date of each exercise of the conferred power and not as of the date of the creation of the trust. As a matter of general practice the power to resort to principal for the designated purposes is rarely and sparingly exercised by the trustee. As a result the charities named in said revocable trust and said last Will and Testament will necessarily realize the benefits [6] conferred upon them by said remainders and said benefits may be definitely ascertained.

(d) The Commissioner of Internal Revenue has heretofore alleged and claimed against the estate of said decedent liability for alleged income tax deficiencies in the total principal sum of \$315,-390.23. It has been proposed that said claim be compromised with the result that upon approval of said compromise the estate of said decedent, Ben F. Sternheim, will be liable to pay the sum of \$109,-975.02 with interest accruing from May 15, 1942, in full settlement of principal and interest on said claim for alleged deficiencies in income taxes. Of this sum it is proposed that Blanche Sternheim will

pay 15,176.57 or a total of 94,798.45, plus accruing interest payable by the estate of said decedent in the event said compromise shall be finally approved. The interest which has accrued on the principal amount of said compromise since the date of the death of said decedent is \$10,608.00, leaving the sum of \$84,190.45 payable as of the date of the death of said decedent in the event said proposed compromise should be finally consummated.

(e) The Commissioner of Internal Revenue has heretofore alleged and claimed against the estate of said decedent, Ben F. Sternheim, liability as transferee for alleged Federal Estate tax deficiencies upon the estate of Rosie Sternheim, deceased, mother of said decedent, Ben F. Sternheim, in the sum of \$11,626.27, plus interest, and \$2,906.57 penalty. The amount actually due for said Federal Estate taxes upon the estate of said Rosie Sternheim, deceased, does not in any event exceed \$6,079.02, plus accruing interest, and penalty in the sum of \$1519.76. The interest on said Federal Estate taxes due upon the estate of said Rosie Sternheim, deceased, to the date of the death of said Ben F. Sternheim, [7] deceased, is the sum of \$5,806.73.

(f) There has become chargeable to the estate of Ben F. Sternheim, deceased, the sum of \$5000. as and for an extraordinary fee of the executor of said estate and the additional sum of \$5000. as and for an extraordinary fee of the attorneys for the executor of said estate;

(g) As set forth in subdivision (b) of the statement attached to said Notice of Deficiency a total sum of \$392.08 was paid as dividends on four life insurance policies payable to the trustee of the revocable trust created by decedent, Ben F. Sternheim, on June 91, 1938. Said dividends increased the value of the charitable remainder of said life insurance trust by the sum of \$145.06;

(h) Petitioner has heretofore filed evidence of inheritance tax paid to the State of California as required by Article 81.9 of Treasury Regulations 105.

(i) The provisions of said revocable trust and said last Will and Testament with respect to the payment of principal are as follows:

“My trustee shall have the power in its uncontrolled discretion to use and apply such part of the principal of the trust estate held for any beneficiary as it may consider suitable or necessary in the interest and for the welfare of such beneficiary in the event of sickness, accident, want or other emergency of or to any of the beneficiaries then receiving the income from the trust estate or from any portion thereof; provided that, except as otherwise herein provided, not more than ten per cent (10%) of the portion of the principal of the trust held for any beneficiary shall be used or applied in any one year for said purposes or any of them.”

Wherefore, petitioner prays that this Board may hear [8] this proceeding and determine that there

is no deficiency in Federal Estate taxes on account of the death of the decedent above named; that the estate of said decedent is entitled to a refund in the sum of \$5,343.45 on account of excess Federal Estate taxes heretofore paid (or more in the event said proposed settlement of alleged income tax deficiency should not be approved and said tax deficiency should ultimately be finally determined to be greater than the amount of said proposed settlement), and for such other relief as to this Board may seem proper.

F. M. McAULIFFE

L. C. BAKER

Attorneys for Petitioner

14 Montgomery Street

San Francisco, California [9]

SN-ET-1

EXHIBIT "A"

Form 1236

(Vignette)

Office of
Internal Revenue Agent in Charge
San Francisco Division
IRA:ET:90-D
CSW

Treasury Department
Internal Revenue Service
74 New Montgomery Street
San Francisco, California

Apr 29 1942

Estate of Ben F. Sternheim, Deceased,
Wells Fargo Bank & Union Trust Co., Executor,
4 Montgomery Street
San Francisco, California

Re: MT-ET-10384-First California
Estate of Ben F. Sternheim
Date of death—April 9, 1940

Gentlemen:

You are advised that the determination of the estate-tax liability of the above-named estate, discloses a deficiency of \$48,824.39, as shown in the statement attached.

In accordance with the provisions of existing internal-revenue laws, notice is hereby given of the deficiency mentioned.

Within 90 days (not counting Sunday or a legal holiday in the District of Columbia as the 90th

day) from the date of the mailing of this letter, you may file a petition with the United States Board of Tax Appeals for a redetermination of the deficiency.

Should you not desire to file a petition, you are requested to execute the enclosed form and forward it to the Internal Revenue Agent in Charge, San Francisco, for the attention of Conference Statement. The signing and filing of this form will expedite the closing of your return by permitting an early assessment of the deficiency and will prevent the accumulation of interest, since the interest period terminates 30 days after filing the form, or on the date assessment is made, whichever is earlier.

Respectfully,

GUY T. HELVERING,

Commissioner,

(Signed) By F. M. HARLESS

Internal Revenue Agent in
Charge.

Enclosures:

Statement.

Form or waiver. [10]

ESTATE TAX

San Francisco

IRA:ET:90-D

CSW

MT-ET-10384-First California

Estate of Ben F. Sternheim

Date of Death—April 9, 1940

STATEMENT

	Liability	Assessed	Deficiency
Estate Tax	\$56,075.21	\$7,250.82	\$48,824.39

In making this determination of the Federal estate tax liability of the above-named estate, careful consideration has been given to the protest dated February 2, 1942, and to statements made at the conference held on February 27, 1942.

In your protest and at the conference above-mentioned, a deduction was referred to and claimed on account of the assertion of the Federal Government against the decedent and his estate of income tax liabilities in the aggregate principal amount of \$315,154.67. The records disclose, however, that determination of the amount of said income tax liabilities is now pending on a petition to the United States Board of Tax Appeals. It is held, therefore, that no deduction is allowable herein on this account until the amount of the obligation is finally determined. (See Article 81.29 of Treasury Regulations 105.)

A copy of this letter and statement has been mailed to your representatives, F. M. McAuliffe and L. C. Baker, 14 Montgomery Street, San Francisco, California, in accordance with the authority contained in the power of attorney executed by you and on file in this office.

Pursuant to the election made by the executor in the return, the estate is valued under the optional valuation provisions of section 811(j) of the Internal Revenue Code and Article 81.11 of Treasury Regulations 105. [11]

Estate of Ben F. Sternheim

Statement

ADJUSTMENT TO NET ESTATE

Net estate for basic tax as disclosed by return.....\$ 24,627.43

Additions to value of net estate and decreases in deductions:

(a) Stocks and Bonds, Schedule B of return	\$ 881.96	
(b) Transfers During Decedent's Life, Schedule G of return	392.08	
(c) Charitable, etc., Bequests, Schedule N of return	283,974.60	285,248.64
Total		\$309,876.07

Reductions in value of net estate and increases in deductions:

(d) Funeral and Administration Expenses, Schedule J of return.....	\$ 22,500.00	
Executor's Commissions	\$ 7,500.00	
Attorney's Fees	15,000.00	
Reductions in value of net estate....	0.00	22,500.00

Net estate for basic tax as adjusted.....\$287,376.07

Net estate for additional tax as adjusted\$347,376.07

EXPLANATION OF ADJUSTMENTS

(a)	Returned	Determined
Stocks and Bonds, Schedule B of return:		
Item 1	\$ 30.00	31.88
Item 2	1,260.41	1,260.06
Item 5	2,136.21	2,134.94
Item 6	5,533.33	5,666.95
Item 7	5,466.67	5,600.28
Item 8	5,333.33	5,466.66
Item 9	5,200.00	5,333.60
Item 10	5,066.67	5,200.26
Item 11	5,000.00	5,066.92
Item 24	2,350.00	2,333.45
Item 33	5,480.33	5,549.33
Item 45—Accrued dividend	0.00	27.50

Estate of Ben F. Sternheim

Statement

EXPLANATION OF ADJUSTMENTS—(Continued)

(a) Continued:	Returned	Determined
Item 59	\$ 933.33	\$ 850.43
Item 64	1,293.27	1,326.67
Item 80	2,333.63	2,366.88
Item 86—Accrued dividend	0.00	83.33
Totals	<u>\$47,417.18</u>	<u>\$48,299.14</u>
Returned amount		<u>47,417.18</u>
Net estate increased		<u>\$ 881.96</u>

The finally determined values of items 1, 2, 5 to 11 inclusive, 24, 33, 59, 64 and 80, of Stocks and Bonds, Schedule B of the return, as shown above, are based upon the means between the high and low stock exchange sales prices on the applicable valuation dates. There has been added to the values of items 45 and 86, as shown above, the value of unpaid dividends that were, however, declared and payable to decedent at the date of his death.

(b)

Transfers During Decedent's Life, Schedule G of return:

First item—Dividends on 4 life insurance
policies payable to trustee of
decedent's revocable trust cre-
ated June 9, 1938.....\$ 0.00 \$392.08

Returned amount 0.00

Net estate increased\$392.08

With respect to the first item of Transfers During Decedent's Life, Schedule G of the return, consisting of four policies of life insurance, it is held that the dividends thereon in the aggregate amount

of \$392.08 payable at the date of death of decedent are not insurance proceeds subject to the specific exemption provided by section 811(g) of the Internal Revenue Code, but that the same are a taxable portion of decedent's revocable trust created by indenture dated June 9, 1938. [13]

Estate of Ben F. Sternheim

Statement

EXPLANATION OF ADJUSTMENTS—(Continued)

(c)	Returned	Determined
Charitable, Public, and Similar Gifts and Bequests, Schedule N of return:		
Items 1 to 7 inclusive.....	\$283,974.60	\$ 0.00
Amount determined deductible	0.00	
Deductions decreased		\$283,974.60

The deductions claimed under items 1 to 7, inclusive, of Charitable, Public, and Similar Gifts and Bequests, Schedule N of the return, are intended to represent the values of remainder interests passing to charitable, public or educational organizations under the terms of a revocable trust created by decedent on June 9, 1938, and under the terms of the testamentary trust created by decedent's last will and testament. In each of said trusts, however, the trustee is given the power, in its uncontrolled discretion, to use and apply such part of the principal of each trust estate, as it may consider suitable or necessary, in the interest and welfare of the individual life beneficiaries in the event of sickness, accident, want or other emergency of or to any of the individual life beneficiaries then receiving the income from the trust estate or from

any portion thereof; provided that, not more than ten per cent (10%) of the portion of the principal of the trust held for any such individual life beneficiary shall be used or applied in any one year for such purposes or any of them. Through these provisions, therefore, the trustee in each case is given the power to divert the whole of the bequests, devises and gifts to uses and purposes which would have rendered them not deductible had they been directly so bequeathed, devised or given by the decedent. Furthermore, because of said provisions, the beneficial interests of the charitable, public, or educational organizations are not severable from the interests in favor of the private uses, and are not presently ascertainable.

It is held, therefore, that these deductions are not allowable. (See section 812(d) of the Internal Revenue Code, and Articles 81.44 and 81.46 of Treasury Regulations 105.) [14]

Estate of Ben F. Sternheim

Statement

EXPLANATION OF ADJUSTMENTS—(Continued)

(d)	Returned	Determined
Funeral and Administration Expenses, Schedule J of return:		
Executor's Commissions	\$ 4,705.59	\$12,205.59
Attorneys' Fees	4,705.59	19,705.59
	<hr/>	<hr/>
Totals	\$ 9,411.18	\$31,911.18
Amount returned		9,411.18
		<hr/>
Deductions increased		\$22,500.00

Executor's commissions and Attorneys' fees are allowed as deductions, as shown above, on the basis

of affidavits of the executor and the attorneys showing that the sums allowed will be claimed and received subject to the allowance of the same by the court having jurisdiction of the administration of this estate. (See Articles 81.33 and 81.34 of Treasury Regulations 105.)

COMPUTATION OF ESTATE TAX

	Returned	Determined
Gross estate	\$420,952.57	\$422,226.61
Deductions for basic tax.....	396,325.14	134,850.54
Net estate for basic tax.....	\$ 24,627.43	\$287,376.07
Net estate for additional tax	\$ 84,627.43	\$347,376.07
Gross basic tax		\$ 7,995.04
Credit for estate and inheritance taxes....		0.00
Net basic tax		\$7,995.04
Total gross taxes (basic and additional)....	\$ 56,075.21	
Gross basic tax	7,995.04	
Net additional tax		48,080.17
Total tax payable		\$56,075.21
Amount shown on return and previously assessed:		
Oriignal, List July 1941, page 102, line 2.....		7,250.82
Deficiency of estate tax		\$48,824.39
Estate of Ben F. Sternheim		[15] Statement

Upon receipt of a waiver, or upon the expiration of 90 days from the date of this letter, if a petition is not filed with the Board of Tax Appeals, \$42,-428.36 of the deficiency will be assessed.

As the balance of the deficiency may be eliminated by credit for State estate, inheritance, legacy or succession taxes, opportunity will be accorded

for the submission of the evidence required by Article 81.9 of Treasury Regulations 105. If after a reasonable time the evidence is not filed, the balance of the deficiency will be assessed. Please advise when the credit evidence may be expected. [16]

(Duly Verified.)

[Endorsed]: U.S.B.T.A. Filed Jul. 7, 1942. [17]

[Title of Board and Cause.]

ANSWER

Comes now the Commissioner of Internal Revenue, respondent above named, by his attorney, J. P. Wenchel, Chief Counsel, Bureau of Internal Revenue, and for answer to the petition filed by the above-named petitioner admits and denies as follows:

1 and 2. Admits the allegations contained in paragraphs 1 and 2 of the petition.

3. Admits that the tax in controversy is Federal estate tax; denies the remaining allegations contained in paragraph 3 of the petition.

4(a) to (i), inclusive. Denies that the Commissioner erred as alleged in subparagraphs (a) to (i), inclusive, of paragraph 4 of the petition.

5(a) to (c), inclusive. Denies the allegations contained in subparagraphs (a) to (c), inclusive, of paragraph 5 of the petition.

5(d). Admits the allegations contained in the first sentence of subparagraph (d) of paragraph 5

of the petition; denies [18] the remaining allegations contained in subparagraph (d) of paragraph 5 of the petition.

5(e) and (f). Denies the allegations contained in subparagraphs (e) and (f) of paragraph 5 of the petition.

5(g). Admits the allegations contained in the first sentence of subparagraph (g) of paragraph 5 of the petition; denies the remaining allegations contained in said subparagraph.

5(h). Denies the allegations contained in subparagraph (h) of paragraph 5 of the petition.

5(i). Admits that said last will and testament contains provisions with respect to the payment of principal as set forth in subparagraph (i) of paragraph 5 of the petition; denies the remaining allegations contained in said subparagraph.

6. Denies generally and specifically each and every allegation in the petition not hereinbefore admitted, qualified or denied.

Wherefore, it is prayed that the Commissioner's determination be approved and the petitioner's appeal denied.

(Signed) J. P. WENCHEL

TMM

Chief Counsel,

Bureau of Internal Revenue.

Of Counsel:

ALVA C. BAIRD,

Division Counsel;

T. M. MATHER,

HARRY R. HORROW

Special Attorneys,

Bureau of Internal Revenue.

HRH:sob 7/31/42

[Endorsed]: U. S. B. T. A. Aug. 5, 1942. [19]

[Title of Board and Cause.]

LAWRENCE C. BAKER., ESQ.,

for the petitioner.

HARRY R. HORROW, ESQ.,

for the respondent.

MEMORANDUM FINDINGS OF FACT AND OPINION.

Smith, Judge. This proceeding is for the re-determination of an estate tax deficiency of \$48,824.39. The questions in issue are whether there were deductible gifts to charity of (1) the remainder interest of an inter vivos trust which the decedent created during his lifetime, naming his sister as life beneficiary with remainder over to charities; [20] and (2) the remainder interests of several testamentary trusts comprising the decedent's residuary estate which he bequeathed in

trust for the benefit of several of his relatives and a friend for life, with remainders over to charities. A third issue relates to a deduction claimed on account of the liability of the estate as transferee for an income tax deficiency of a corporation, Sternheim Co., of which decedent was the principal stockholder.

Other issues raised in the pleading have been settled by stipulation. The issues in controversy will be considered separately in the order stated.

The decedent died on April 9, 1940, a resident of San Francisco, California. The petitioner herein, as executor, filed an estate tax return on behalf of the estate with the collector of internal revenue for the first district of California on July 9, 1941.

The Inter Vivos Trust.

Findings of Fact.—Prior to his death the decedent, on June 9, 1938, transferred to the Wells Fargo Bank & Union Trust Co. of San Francisco, as trustee, policies of insurance on his life in the aggregate amount of \$20,000, and savings accounts of approximately \$73,000. The income of the trust was to be accumulated and added to principal during the life of the decedent. After his death the income was to be paid to his sister, Blanche M. Sternheim, for life. Upon her death the trust estate was to be divided among the Shriners Hospital for Crippled Children of San Francisco, Mount Zion Hospital, San Francisco, and the Community Chest of San Francisco, in whatever proportion the trustee in its sole discretion might elect. The trust agreement contained the following pro-

vision authorizing the trustee, in certain circumstances, to invade the trust principal: [21]

11. The Trustee shall have the power in its uncontrolled discretion to use and apply such part of the principal of the trust estate held for any beneficiary as it may consider suitable or necessary in the interest and for the welfare of such beneficiary in the event of sickness, accident, want, or other emergency of or to any of the beneficiaries then receiving the income from the trust estate or from any portion thereof; provided that, except as otherwise herein provided, not more than ten per cent (10%) of the principal of the trust estate shall be used or applied in any one year for said purposes of any of them.

The decedent reserved the right to amend, alter, or revoke the trust at any time during his lifetime.

The value of the trust estate at the date of decedent's death was approximately \$97,000. The present value of the assets, which now consist principally of securities, is approximately \$87,000. The trust has yielded annual net income since decedent's death of approximately \$2,100. All of this income has been paid to the life beneficiary.

At the date of decedent's death Blanche Sternheim was also the life beneficiary of a trust which she herself established in 1929. The decedent was named trustee of this trust and so served until his death. Soon thereafter the trust agreement was completely revised under the power reserved to the trustor. In the revised trust agreement Wells

Fargo Bank & Union Trust Co. was named as substitute trustee and has served as trustee up to the present time. The provisions of that trust agreement for the most part are not here material. In short, the settlor is entitled to all of the income and has a reserve power which gives her virtual control over the principal of the trust. The assets of the trust have a present value of approximately \$138,700. The net income amounts to approximately \$7,300 a year.

At the time of decedent's death Blanche Sternheim was 60 years of age and in sound health. She resides at the Hotel Californian, San Francisco, where her ordinary living expenses amount to about \$250 or [22] \$300 per month. She regularly saves from \$250 to \$300 a month out of the income which she receives from the above described trusts. She enjoys good health generally and is economical in her living habits.

After decedent's death it was discovered that he had commingled assets of his own estate and those of the trust created by Blanche Sternheim of which he was trustee. Pending a partition of the commingled assets the income distributions from that trust were suspended and Blanche Sternheim was given an allowance of \$500 a month from the corpus of the inter vivos trust which decedent had created. This allowance was made by the trustee pursuant to the emergency clause of the trust instrument and upon the agreement of Blanche Sternheim to repay the amounts so withdrawn to the trust. A total of \$1,500 was so paid to her and later repaid to the trust.

Thereafter, and at some time not disclosed by the evidence, payments of \$500 a month for a period of seven or eight months were made to Blanche Sternheim out of the principal of the inter vivos trust while the income distributions from both trusts were suspended pending settlement of an income tax controversy affecting the assets of the trusts. The income tax controversy referred to involved a transferee liability for income taxes of a corporation known as the Sternheim Co., the stock of which had all been owned by the decedent and Blanche Sternheim. The Commissioner asserted the transferee liability both against Blanche Sternheim and decedent's estate. In final settlement of the matter, and upon the insistence of Blanche Sternheim, the trustee of the inter vivos trust, which was also the executor of the decedent's estate, paid to the collector of internal revenue \$8,999.16 out of the principal of the trust in part satisfaction of her transferee liability. [23]

Opinion.—The respondent's position is that the trust provisions authorizing the invasion of the corpus for the benefit of the life beneficiary, as administered by the trustee, render the gift to charities of the remainder interest uncertain and the amount of such gift, if any, incapable of ascertainment. Petitioner's contentions are that the possibility of invasion of the trust corpus was so remote as not to affect the value of the gift of the remainder interest to charities.

In *Ithaca Trust Co. v. United States*, 279 U.S. 151, the Supreme Court held that a bequest to

charity of the remainder interest of a trust, after termination of a life estate in the testator's widow, was deductible from the gross estate as a gift to charity, notwithstanding that the trustees were authorized to expend as much of the trust corpus as necessary to maintain the widow "in as much comfort as she now enjoys." The court found that "the standard was fixed in fact and capable of being stated in definite terms of money" and that "there was no uncertainty appreciably greater than the general uncertainty that attends human affairs."

A gift to charity of the remainder interest of a testamentary trust was held deductible in *Commissioner v. Bank of America Nat. Trust & Savings Assn., Executor (Will of Elisha Cobb Mayo)*, 133 Fed. (2d) 753, where the life beneficiary, the testator's sister, was to receive a monthly payment out of the trust income, and such additional amounts out of principal as might be reasonable should accident, illness, or other circumstances require.

On authority of those and other like cases we would be constrained to hold, upon a consideration of the provisions of the trust instrument and the financial condition of the life beneficiary, that the probability [24] of an invasion of the principal of the trust, to the detriment of the gift to charities, was so remote as not seriously to affect the value of the charitable gift. However, the facts are that since decedent's death there have been invasions of the corpus of the trust. On one occasion the trustee paid Blanche Sternheim an allowance out

of the principal of the trust for ordinary living expenses during a period when payments to her of the income from that trust, as well as the trust which she herself had created, were suspended pending settlement of matters affecting the assets of the trusts. The amount of the allowance was approximately \$3,700. The corpus of the trust was again invaded to the extent of \$8,999.16 for the purpose of paying a portion of Blanche Sternheim's transferee liability for the income taxes of the Sternheim Co. The record is not clear upon what authority the trustee permitted those withdrawals from the principal of the trust. The only explanation of record is that the withdrawals were made pursuant to the emergency clause of the trust agreement. A trust officer of the trustee bank, who handled the affairs of the trust, testified that the \$8,999.16 payment was made as a compromise and because of the probable transferee liability of the trust for the full amount of the tax deficiency of the Sternheim Co. However that may be, we can not overlook these subsequent events in determining the probability of an invasion of the trust corpus as of the date of decedent's death. We can not say, in the light of these facts, that the probability of an invasion of the trust corpus was so remote as not to affect the value of the gift of the remainder interest to charities..

There is no question between the parties but that gifts made to the charities named in the trust instrument would be deductible from the gross estate. The respondent has disallowed the deduction

of the entire value [25] of the remainder interest to charities upon the ground that the value of the gift is incapable of ascertainment. We think, however, that this is wrong. Blanche Sternheim, the beneficiary of the inter vivos trust, had a limited life expectancy. Even if the trust principal was invaded each year to the extent of 10 per cent of the then principal there would still be a remainder interest which would go to the charities named. In the circumstances of the case we think it must be assumed that the principal of the inter vivos trust was liable to be invaded to the extent of 10 per cent of the principal each year during the life expectancy of Blanche Sternheim. The remainder interest to charities, which can be determined by reference to standard mortality tables, is deductible from the gross estate.

The Testamentary Trusts.

Findings of Fact.—The decedent bequeathed the residue of his estate to Wells Fargo Bank & Union Trust Co. in trust, directing the trustee to divide the residuary estate into six equal parts and to hold one of such parts in trust for the benefit for life of a cousin living in Berlin, Germany; another for the benefit for life of a cousin living in Duisburg, Germany; another part for the benefit for life of a cousin living in San Francisco, and the remaining three parts for the benefit for life of a friend living in San Francisco. Each of the beneficiaries was entitled to receive all of the income from his or her trust for life and in addi-

tion the trustee was empowered in its sole discretion to invade the corpora of the trusts upon the same conditions and with the same limitations as in the inter vivos trust, as set out above. The three first mentioned life beneficiaries of decedent's residuary trust estate were 73, 71, and 74 years of age, respectively, at the time of decedent's death. The other life beneficiary was 61 years of age. [26]

The appraised gross value of decedent's estate as of the date of his death was \$387,558.86. The estimated value of the assets of the estate as of January 26, 1943, was \$188,623.97. The shrinkage in value between those dates was due to the payment of claims against the estate of \$11,887.47; administration expenses of \$10,000; inheritance taxes of \$12,000; claims for individual income tax of decedent upon the income tax liability of Sternheim Co. \$114,376.63; and depreciation in the market value of the assets of the trust in the amount of approximately \$50,000. This value of \$188,623.97 does not take into account unpaid claims for additional executor's commissions and attorneys' fees estimated in the deficiency notice of \$22,500.

Because of unsettled tax claims the estate has not yet been closed and there has been no transfer of the residuary estate to the testamentary trustee. A total of \$28,478.77 of income of the estate has been distributed to the beneficiaries of the testamentary trusts by the executor pursuant to order of the probate court. The estimated an-

nual net income of decedent's estate as now constituted is approximately \$7,000.

Opinion.—The evidence of record does not show what independent funds or income of their own any of the beneficiaries of the testamentary trusts had at the time of decedent's death, nor any of the other circumstances which might determine the probability of invasion of the corpora of the trusts under the emergency provisions of the will. We must assume therefore that, as in the case of inter vivos trust, the corpus of each of the testamentary trusts was subject to the full amount of the payments to the beneficiary authorized by the will. Not more than 10 percent of the corpus of any of the trusts could be so paid out in any year. The [27] beneficiaries were all of advanced ages. Based on mortality tables the remainder interest that was certain to go to charity is capable of definite determination. We think that the value of the remainder interests so computed is deductible from the gross estate.

Deduction claimed on account of liability as transferee for income tax of Sternheim Co.

Findings of Fact.—After decedent's death the respondent asserted against his estate a transferee liability for a large amount of income taxes of a corporation known as the Sternheim Co. Decedent had owned two-thirds of the stock of that company and the remaining one-third had been owned by his sister, Blanche Sternheim. The respondent asserted transferee liability for the taxes of the Sternheim

Co. against the sister also. She and the representatives of decedent's estate tentatively agreed that, with a minor adjustment, they would bear the burden of the Sternheim Co. taxes in the proportion of stock ownership, and the asserted liability was settled accordingly. Thereafter, the respondent determined a further deficiency against Sternheim Co. of some \$28,000 which he likewise asserted against decedent's estate, and also against Blanche Sternheim. The latter protested her liability for any such additional taxes and insisted that in any event her portion should be paid out of the funds of the inter vivos trust which decedent had created for her benefit. In final settlement of the matter \$8,999.16 of the additional liability was paid out of the assets of the inter vivos trust. The amount finally paid by decedent's estate was \$2,000 in excess of its two-thirds portion of the asserted liability. This \$2,000 is said to have been allowed to Blanche Sternheim to reimburse her in part for attorneys' fees incurred in settling the tax controversy. The executor [28] of decedent's estate agreed to this settlement upon advice of counsel and for reasons which is considered advantageous to the estate.

Opinion.—Petitioner contends that it is entitled to deduct from the gross estate not only the amount of the Sternheim Co. tax liability which was paid out of the assets of the estate but also the amount that was paid out of the assets of the inter vivos trust on behalf of Blanche Sternheim. Respondent contends that the estate is entitled to the deduction of only two-thirds of the total amount of the Stern-

heim Company's tax deficiency. His contentions are that since decedent owned only two-thirds of the stock of Sternheim Co. his estate is entitled to the deduction of only two-thirds of the company's tax liability; and that in no event can the estate claim a deduction on account of that portion of the liability which was paid out of the assets of the inter vivos trust estate.

Section 812 of the Internal Revenue Code provides for the deduction from the gross estate, in determining the value of the net estate, of such claims against the estate as are allowed by the laws of the jurisdiction under which the estate is being administered, with certain exceptions not here material.

If the decedent's estate had been solely liable for the entire amount of the tax deficiency of the Sternheim Co. and had paid or had lawfully assumed payment of the full amount, without any right of contribution from others, then undoubtedly it would be entitled to deduct the full amount as a claim against the estate. The facts are, however, that Blanche Sternheim as a one-third stockholder of the taxpayer corporation admitted her liability for one-third of the company's tax deficiency and paid her portion of the liability, as first determined by the respondent, on that basis. It [29] is not shown that the executor of decedent's estate ever admitted any obligation to pay more than two-thirds of the asserted liability. It did agree to pay \$2,000 over and above its two-thirds portion for the purpose, it is said, of assisting Blanche Sternheim in

paying her attorneys' fees in connection with the matter. That amount and the further amount of \$8,999.16 which was paid out of the funds of the inter vivos trust, constituted excess over the two-thirds portion allocated to decedent's estate and are the specific amounts now in controversy.

We think that the respondent properly disallowed the deduction of that portion of the transferee liability that was paid out of the funds of the inter vivos trust. Apparently decedent's estate would have been entitled to a contribution from Blanche Sternheim for any payment in excess of its two-thirds portion of the liability. See *Phillips-Jones Corporation v. Parmley*, 302 U.S. 233. The Supreme Court in that case said:

Since the enactment of section 280, as before, a bill in equity against a stockholder transferee is a remedy available to the Commissioner to enforce the tax liability of the corporation. *Leighton v. United States*, 289 U.S. 506, 53 S. Ct. 719, 77 L. Ed. 1350; *Hulburt v. Commissioner*, 296 U.S. 300, 303, 56 S. Ct. 197, 199, 80 L. Ed. 242. If he had resorted to that remedy he could have sued Phillips alone (see *Phillips v. Commissioner*, *supra*, 283 U.S. 589, at pages 603, 604, 51 S. Ct. 608, 614, 75 L. Ed. 1289); and if thereupon Phillips had paid the entire tax, obviously he could have brought a bill in equity against the other stockholders for contribution. The right is no less where the Commissioner proceeds under section 280. This statute does not affect the

duty of other stockholder transferees to contribute; it merely provides the Commissioner with a summary remedy for enforcing existing tax liability. * * *

Blanche Sternheim had ample funds of her own with which to pay her full portion of the transferee liability. It is not clear what right she had to demand that the funds of the inter vivos trust be used for that purpose nor upon what authority the trustee permitted it. In his testimony [30] the trust officer of the trustee bank described it as a compromise settlement. The principal of the trust belonged neither to Blanche Sternheim nor to the decedent's estate. The remainder interest of the trust, after the life estate of Blanche Sternheim, was to go to named charities. The value of the trust was includable, in part, in decedent's gross estate because the trust was a revocable trust, but the trust assets did not pass to the executor and were not subject to probate as a part of decedent's estate. However that may be, we think that the respondent correctly disallowed the deduction of the \$8,999.16 from decedent's gross estate.

The situation is somewhat different as to the \$2,000 item. That amount also was over and above the two-thirds portion of the transferee liability allocable to the decedent's estate. Undoubtedly if the executor of decedent's estate had been required to pay more than two-thirds of the Sternheim Company's taxes because of its liability as a transferee it would have had a right against Blanche Sternheim for a contribution of the excess amount.

Equitably Blanche Sternheim was liable for at least one-third of the Sternheim Company's unpaid taxes. In these circumstances we do not think that it can be said that the \$2,000 item was a deductible liability of, or claim against, the estate.

Decision will be entered under Rule 50.

Entered Jun 24 1943 [31]

The Tax Court of the United States
Washington

Docket No. 111776

ESTATE OF BEN F. STERNHEIM, Deceased,
WELLS FARGO BANK & UNION TRUST
CO., Executor,

Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

DECISION

Pursuant to the Court's Memorandum Findings of Fact and Opinion, entered June 24, 1943, the respondent having filed a recomputation of tax on August 14, 1943, and petitioner having filed an acquiescence therein on September 2, 1943, it is

Ordered and Decided: That there is a deficiency in estate tax of \$16,450.04.

Entered Sep - 3 1943

(Signed) J. E. MURDOCK

Judge. [32]

In the United States Circuit Court of Appeals
For the Ninth Circuit

Docket No. 111776

ESTATE OF BEN F. STERNHEIM, Deceased,
WELLS FARGO BANK & UNION TRUST
CO., Executor,

Petitioner on Review

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent on Review

PETITION FOR REVIEW

Estate of Ben F. Sternheim, deceased, Wells Fargo Bank & Union Trust Co., Executor, hereby petitions the United States Circuit Court of Appeals for the Ninth Circuit to review the decision entered by the Tax Court of the United States on September 3, 1943, that there is a deficiency in estate tax of \$16,450.04 due from the estate of Ben F. Sternheim (date of death, April 9, 1940). This petition for review is filed pursuant to the provisions of Sections 1141 and 1142 of the Internal Revenue Code.

I.

Jurisdiction

Wells Fargo Bank & Union Trust Co. of San Francisco, California, is the duly appointed, qualified and acting executor of the will of the decedent.

The estate tax return made [33] on behalf of decedent's estate was filed with the Collector of Internal Revenue for the First District of California, whose office is located at San Francisco, California, which is within the jurisdiction of the United States Circuit Court of Appeals for the Ninth Circuit.

II.

Nature of the Controversy

Prior to his death decedent, on June 9, 1938, transferred to Wells Fargo Bank & Union Trust Co., as trustee under a revocable inter vivos trust, certain insurance policies and savings bank accounts. The income from the trust estate was payable to the decedent during his lifetime, and after his death to his sister during her lifetime. Upon the death of said sister the trust is to terminate and the corpus of the trust estate is to be distributed among designated charitable institutions. Paragraph 11 of the trust agreement provides as follows:

“The Trustee shall have the power in its uncontrolled discretion to use and apply such part of the principal of the trust estate held for any beneficiary as it may consider suitable or necessary in the interest and for the welfare of such beneficiary in the event of sickness, accident, want, or other emergency of or to any of the beneficiaries then receiving the income from the trust estate or from any portion thereof; provided that, except as otherwise herein provided, not more than ten per cent

(10%) of the principal of the trust estate shall be used or applied in any one year for said purposes or any of them.”

Under the provisions of decedent's last will and testament the residue of his estate was divided into four [34] separate trusts. The income from each trust is payable to designated life beneficiaries, and upon the death of each life beneficiary the trust for his or her benefit is to terminate and the corpus thereof is to be distributed among charitable institutions. The will contains a provision for resort to the corpus of each trust in the event of sickness, accident, want or other emergency of or to each life beneficiary, in terms substantially similar to those hereinbefore quoted from the inter vivos trust agreement.

In the estate tax return made on behalf of the decedent's estate, the executor aforesaid claimed a deduction from the gross estate in the amount of the value of the remainder interest in the corpus of the aforesaid inter vivos trust and in the amount of the remainder interest in the aforesaid testamentary trust. Based upon the provision hereinbefore quoted and the similar provision in decedent's will authorizing resort to corpus of the trusts for the specified purposes, the Commissioner disallowed the claimed deduction.

The Memorandum Findings of Fact and Opinion of the Tax Court erroneously held that the estate was not entitled in full to the claimed deduction in the amount of the value of the remainder of the inter vivos trust, and the final order of redeter-

mination of the deficiency was entered on September 3, 1943, in which the Tax Court erroneously decided that there was a deficiency in the estate tax in the sum of \$16,450.04. [35]

III.

Assignments of Error

Estate of Ben F. Sternheim, deceased, Wells Fargo Bank & Union Trust Co., Executor, being aggrieved by certain of the conclusions of law set forth in the decision of the Tax Court and by its order of redetermination of the deficiency in estate tax, desires to obtain a review thereof by the United States Circuit Court of Appeals for the Ninth Circuit.

The assignments of error are as follows:

1. The Tax Court erred in holding and deciding that the estate is not entitled to a deduction from the decedent's gross estate in the amount of the full value of the remainder interest in charitable institutions created by the revocable inter vivos trust agreement.

2. The Tax Court erred in not holding and deciding that the estate is entitled to a deduction from the decedent's gross estate in the amount of the full value of the remainder interest in charitable institutions created by the revocable inter vivos trust agreement.

3. The Tax Court erred in holding and deciding that the fact that payments were made from the corpus to the life tenant of the revocable inter vivos trust subsequent to the date of the death of the decedent, as the result of events which occurred

subsequent to the date of the death of the decedent, disintitled the estate to a deduction from the [36] decedent's gross estate in the amount of the full value of the remainder interest in charitable institutions created by the revocable inter vivos trust agreement.

4. The Tax Court erred in not holding and deciding that the fact that payments were made from the corpus to the life tenant of the revocable inter vivos trust subsequent to the date of the death of the decedent, as the result of events which occurred subsequent to the date of the death of the decedent, did not disentitle the estate to a deduction from the decedent's gross estate in the amount of the full value of the remainder interest in charitable institutions created by the revocable inter vivos trust agreement.

5. The Tax Court erred in entering its order of redetermination that there is a deficiency in the estate tax in the amount of \$16,450.04.

Wherefore, petitioner herein prays that this honorable Court may review said findings of fact and opinion and decision of the Tax Court of the United States, and that appropriate action be taken to the end that the errors herein complained of may be reviewed and corrected by said Court.

F. M. McAULIFFE,

L. C. BAKER,

Counsel for Petitioner on Review. [37]

(Duly Verified.)

[Endorsed]: T.C.U.S. Filed Nov. 9, 1943. [38]

[Title of Circuit Court of Appeals and Cause.]

NOTICE OF FILING PETITION
FOR REVIEW

To Hon. J. P. Wenchel, Chief Counsel, Bureau of
Internal Revenue:

You are hereby notified that Estate of Ben F. Sternheim, deceased, Wells Fargo Bank & Union Trust Co., executor, did, on the 9th day of November, 1943, file with the Clerk of the Tax Court of the United States, at Washington, D. C., a petition for review by the United States Circuit Court of Appeals for the Ninth Circuit, of the decision of the Tax Court heretofore rendered in the above entitled cause.

A copy of the petition for review and the assignments of error as filed is hereto attached and served upon you.

Dated: this 9th day of November, 1943.

(S) F. M. McAULIFFE,

(S) L. C. BAKER,

Counsel for Petitioner on Review.

Personal service of the above and foregoing notice, together with a copy of the petition for review and assignments of errors mentioned therein, is hereby acknowledged this 9th day of November, 1943,

(S) J. P. WENCHEL,

Chief Counsel, Bureau of Internal Revenue, Attorney for Respondent on Review.

[Endorsed]: T.C.U.S. Filed Nov. 9, 1943. [39]

[Title of Board and Cause.]

EXCERPTS FROM
TRANSCRIPT OF TESTIMONY

Hearing at San Francisco, Calif.

Date February 2, 1943

FRANK J. BRICKWEDEL

was called as a witness for and on behalf of the Petitioner, and having been first duly sworn was examined and testified as follows:

Judge Smith: Give your name to the reporter.

The Witness: Frank J. Brickwedel, B-r-i-c-k-w-e-d-e-l.

Direct Examination

By Mr. Baker:

Q. Where do you reside, Mr. Brickwedel?

A. 2121 Sacramento Street, San Francisco.

Q. What is your occupation?

A. Vice President and Trust Officer of Wells Fargo Bank & Union Trust Co.

Q. How long have you occupied that position?

[41]

A. For about 16 years.

Q. And you have been with the bank for what period of time?

A. Oh, since 1903.

Q. Yes. Now, Mr. Brickwedel, Wells Fargo Bank & Union Trust Co. is the duly-appointed, qualified, and acting executor of the last will and testament of Ben F. Sternheim, deceased, is it not?

(Testimony of Frank J. Brickwedel.)

A. It is.

Q. Mr. Brickwedel, I show you a document which purports to be a copy of the last will and testament of Ben F. Sternheim, deceased, and ask you if that is a full, true and correct copy of his will?

A. (Examining document): I believe it is.

Mr. Baker: Yes. I will offer this in evidence, if your Honor please, as Petitioner's first exhibit.

Mr. Horrow: No objection, your Honor.

Judge Smith: It will be marked Petitioner's Exhibit 1 and received in evidence.

(Last will and testament referred to marked Petitioner's Exhibit No. 1 and received in evidence.) [42]

PETITIONER'S EXHIBIT No. 1

I, Ben F. Sternheim, a resident of the City and County of San Francisco, State of California, being of sound and disposing mind and memory and not acting under duress, menace, fraud or the undue influence of any person whomsoever, do make, publish and declare this to be my last Will and Testament in manner following, that is to say:

Article I

I hereby revoke all former Wills and Codicils to Wills by me made.

Article II

I nominate and appoint Wells Fargo Bank & Union Trust Co. executor of this, my last Will and

(Testimony of Frank J. Brickwedel.)

Testament, and trustee of the trusts herein created. I give unto my said executor and trustee full power and authority to sell at public or private sale (for cash or on terms), improve, lease (without restriction or limit as to term), mortgage, convey in trust, pledge, hypothecate, transfer, exchange, compromise, surrender or otherwise deal with or dispose of any of my property, with or without notice, and without the necessity of obtaining the Order of any Court therefor, and confer upon my said trustee in addition to the foregoing, full power and authority (a) to hold all stocks, bonds, securities and any other property which may constitute a part of my estate; (b) to invest and reinvest the proceeds therefrom in such property, real or personal, as my trustee shall deem fit and proper, without being restricted to investments prescribed or authorized by law as trustees' investments; (c) to exercise any right or option of subscription or otherwise which

[In Margin]: B.F.S.

(Page One)

may at any time attach, belong or be given to the holders of any stocks, bonds, securities or other instruments in the nature thereof forming part of the trust estate, and to join in any plan of lease, mortgage, consolidation, reorganization or foreclosure of any corporation, trust or organization, or the property or assets thereof, including the deposit of bonds, securities and stock with any bondholders', stockholders' or protective committee in which the trust estate may hold stocks or bonds or other securities, and to take and hold any securities issued

(Testimony of Frank J. Brickwedel.)

under such plan and to pay any assessments thereunder; (d) to enforce any mortgage or deed of trust or pledge held hereunder and to purchase at any sale thereunder any property subject thereto; (e) to hold any securities in bearer form or in the name of the trustee or of any nominee of the trustee, and to exercise any of the powers set forth herein through such nominee.

Article III

I give and bequeath, outright, unto my sister, Blanche M. Sternheim, all my personal effects, clothing, jewelry, household furniture and furnishings, and any automobile or automobiles which I may own at the time of my death, with the suggestion to her that (after making her own selection) she may desire to distribute a portion or portions of the foregoing items among my relatives or friends. No other provision is made for my said sister, Blanche M. Sternheim, inasmuch as I have made ample provision for her by other means.

Article IV

I give and bequeath unto Max Kahn, of 611 Mills Building, San Francisco, California, the sum of Two Thousand Dollars (\$2,000), and in addition thereto all my office furniture located at said address.

[In Margin]: B.F.S.

(Page Two)

(Testimony of Frank J. Brickwedel.)

Article V

I give and bequeath unto the Congregation Emanu-El the sum of Two Thousand Dollars (\$2,000) for Perpetual Care Fund of the Family Plot in Home of Peace Cemetery.

Article VI

I give and bequeath unto Mrs. George A. Fischer, 2424 Alemany Boulevard, San Francisco, California, the sum of One Thousand Dollars (\$1,000).

Article VII

I give, devise and bequeath all the rest, residue and remainder of my estate of whatsoever kind or character and wheresoever situate unto Wells Fargo Bank & Union Trust Co., my said trustee, in trust, nevertheless, for the following uses and purposes:

My trustee shall divide the entire balance of my said estate into six parts as nearly equal as possible, and shall hold, administer and distribute said parts as hereinafter provided.

The Trustee shall hold one of such equal parts for the use and benefit of my cousin Carrie Blattner of Brandenburgische str. 38, Berlin W15, Germany, and shall pay to her the entire net income, revenue and profit therefrom in the form of marks or other suitable currency, and upon her death the trust shall cease and terminate as to such part and the principal thereof shall vest in and go to the Pacific Hebrew Orphan Asylum & Home Society and to the Federation of Jewish Charities, in the name of and

(Testimony of Frank J. Brickwedel.)

as a memorial to my mother, Rosie Sternheim, in the portions and amounts to be decided in the sole, uncontrolled and absolute discretion of my trustee

[In Margin]: B.F.S.

(Page Four)

upon considering the then existing needs of the said organizations and institutions.

My trustee shall hold the second of such equal parts for the use and benefit of my cousin, Julius Fleischer, of Hondenburg str. 72, Duisburg, Germany, and shall pay to him the entire net income, revenue and profit therefrom in the form of marks or other suitable currency, and upon his death the trust shall cease and terminate as to such part and the principal thereof shall vest in and go to Eureka Benevolent Society, Hebrew Home for the Aged Disabled, and Children's Hospital, of San Francisco, in the name of and as a memorial to my mother, Rosie Sternheim, in the portions and amounts to be decided in the sole, uncontrolled and absolute discretion of my trustee upon considering the then existing needs of the said organizations and institutions.

My trustees shall hold the third of such equal parts for the use and benefit of my cousin, Lena Kohlman, of Hotel Glen Royal, 940 Sutter Street, San Francisco, California, and shall pay to her the entire net income, revenue and profit therefrom, and upon her death the trust shall cease and terminate as to such part and the principal thereof shall vest in and go to the Salvation Army, of San Francisco, San Francisco Nursery for Homeless

(Testimony of Frank J. Brickwedel.)

Children, Childrens Protective Society of San Francisco, Travelers Aid Society of San Francisco, San Francisco Society for the Prevention of Cruelty to Animals, and Children's Home Society of California, in the portions and amounts to be decided in the sole, uncontrolled and absolute discretion of my trustee upon considering the then existing needs of the said organizations and institutions.

My trustee shall hold the three remaining parts for the use and benefit of Helene M. Opet, a life-long friend, residing at 1245 California Street, San Francisco, California, and shall pay to her the en-

[In Margin]: B.F.S.

(Page Four)

tire net income, revenue and profit therefrom, and upon her death the trust shall cease and terminate as to such parts and the principal thereof shall vest in and go to the Regents of the University of California and the Board of Trustees of Leland Stanford Jr. University (to be known as the Rosie Sternheim Scholarships Memorial, to provide scholarships for needy students) in the portions and amounts to be decided in the sole, uncontrolled and absolute discretion of my trustee upon considering the then existing needs of the said institutions.

All of the foregoing life beneficiaries shall receive the net income from the parts held for them from the date of my death.

My trustee shall apply the entire net income of all securities held by it hereunder to the use of the beneficiaries hereof, irrespective of the price paid for said securities or irrespective of their market

(Testimony of Frank J. Brickwedel.)

value at any time, it being intended hereby that no part of such income shall be applied as a sinking fund or otherwise to offset the gradual loss of premium upon the market value or purchase price of such securities. All stock dividends (other than those expressly stated by the declaring corporation to be out of current earnings) and amounts received upon the sale of Rights to Subscribe for stocks or any profit accruing from the exercise of such Rights shall be credited to principal and added to the trust estate and be held as a part thereof.

My trustee shall have the power in its uncontrolled discretion to use and apply such part of the principal of the trust estate held for any beneficiary as it may consider suitable or necessary in the interest and for the welfare of such beneficiary in the event of sickness, accident, want or other emergency of or to any of the beneficiaries then receiving the income from the trust estate or from any portion thereof; provided that, except as otherwise herein provided, not more than ten per cent (10%) of the portion of the principal of the trust held for any beneficiary shall be used or applied in any one year for said purposes or any of them.

[In Margin]: B.F.S.

(Page Five)

All income or principal to be paid to any of the beneficiaries named herein shall be paid by the trustee direct and only to said beneficiaries. My trustee is not to recognize any transfer, mortgage, pledge, hypothecation, order or assignment of any beneficiary by way of anticipation of any part of

(Testimony of Frank J. Brickwedel.)

the income or principal. The principal and income of the trust estate shall not be subject in any manner to transfer by operation of law unless otherwise herein provided, and shall be exempt from the claims of creditors or other claimants and from orders, decrees, levies, attachments, garnishments and executions and other legal or equitable process or proceedings to the fullest extent permissible by law.

Article VIII.

I direct that all taxes including inheritance and Federal Estate Taxes which may be chargeable against my estate or against the gifts, devises and bequests and interests under this Will, shall be paid out of the general assets of my estate, it being my intention that each and every gift, devise and bequest under this Will shall be delivered to and taken by each devisee, legatee and beneficiary hereunder in full without deduction on account of any such taxes.

Article IX.

I hereby declare that I have never been married and have never been a parent of a child in or out of wedlock, and that no claim to the contrary has ever been made by any one during my life.

I have purposely made no provision for any other person whether claiming to be an heir of mine or not, and if any person whether a beneficiary under this Will or not mentioned herein shall contest

[In Margin]: B.F.S.

(Page Six)

this, my last Will and Testament (which shall in-

(Testimony of Frank J. Brickwedel.)

clude any Codicil hereto), or object to or oppose the probate thereof, or take any proceeding before any Court to annul any provision thereof or have any provision thereof declared void or to have the probate thereof revoked, or should any such person if requested so to do by my executor decline to join in the application for the probate of this, my last Will and Testament, or decline to assent to the probate thereof, then and in any such event I direct that all interest of such person in or under this, my last Will and Testament, as a legatee or devisee or beneficiary of any trust shall cease and become void, and if such person shall be successful in a Court of final jurisdiction, I give and bequeath the sum of Five Dollars (\$5.00) to such person, and the sum or property or benefit such person would have received under said Will and all sums or property provided to be held in trust for his or her use shall be added to the residue of my estate and shall be distributed to the beneficiaries of such residue as herein provided in the same shares and in the same manner as if such person so offending against the provisions of this paragraph had died at that time without heirs.

In Witness Whereof I have hereunto set my hand and seal this 17th day of June, in the year One Thousand Nine Hundred and Thirty-eight.

BEN F. STERNHEIM

(Page Seven)

The foregoing instrument consisting of seven (7) pages besides this page was at the date thereof by

(Testimony of Frank J. Brickwedel.)

the said BEN F. STERNHEIM signed and sealed and published as and declared to be his last Will and Testament in the presence of us, who, at his request and in his presence and in the presence of each other, have subscribed our names as witnesses thereto.

LOUIS HEILBRON

Residing at 1865 California St., San Francisco, Calif.

LAWRENCE C. BAKER

Residing at 2805 Green St., San Francisco, Calif.

[Endorsed]: T.C.U.S. Filed Feb. 2, 1942.

(Page Eight)

By Mr. Baker:

Q. Now, Mr. Brickwedel, during his lifetime did the decedent, Ben Sternheim, create a revocable inter vivos trust naming Wells Fargo Bank & Union Trust Company as trustee? [43]

A. He did.

Q. And do you know the nature of the assets which he transferred at that time to you as trustee?

A. I do.

Q. Will you please state what they were?

A. Life insurance and savings accounts representing funds on deposit.

Q. What was the amount of the life insurance, if you know?

A. I don't recall that figure.

(Testimony of Frank J. Brickwedel.)

Q. Do you know the value of the trust as it was then constituted when Mr. Sternheim transferred the assets to you as trustee?

A. Going back to the previous question, there were four policies of life insurance on the life of Ben F. Sternheim, each in the amount of \$5,000.

Q. So that the amount of insurance was \$20,000?

A. Yes, sir.

Q. And the rest of the estate was in cash?

A. Well, it was represented by savings books.

Q. Yes.

A. Books issued by banks for savings deposits and there were approximately \$73,000 of funds so represented.

Q. So that the total value of the estate at that time was approximately \$93,000? [44]

A. Well, if we include the policies at their death indemnity values.

Q. Yes. A. Yes.

Q. What was the value of the estate at the time of the death of Ben Sternheim?

A. I don't think I brought that figure.

Mr. Horrow: Counsel, I have the estate tax return filed by the estate which shows the amounts in the savings accounts at the date of death. I intend to place the return in evidence so that it will disclose the value of the inter vivos trust at the date of death.

There is no dispute as to that.

Mr. Baker: No. Thank you, Mr. Horrow.

(Testimony of Frank J. Brickwedel.)

Our value is \$94,046.26. Does that correspond with your figures?

Mr. Horrow: Well, the estate tax return shows savings accounts totalling \$76,928.86 together with insurance of \$20,000.

Mr. Baker: Well, I am willing to accept that amount as being correct, \$96,000-odd.

By Mr. Baker:

Q. Mr. Brickwedel, I show you a document which purports to be a copy of the trust instrument covering the trust created by Ben Sternheim during his lifetime, that is, [45] the living trust, and ask you if that is a true and correct copy of that document, of the original document?

A. (Examining document): True and correct except that it does not include the exhibit referred to in it.

Q. Yes, but it does set forth fully the terms and provisions of the agreement?

A. Yes, sir.

Mr. Baker: I will offer this document in evidence as Petitioner's exhibit next in order.

Mr. Horrow: No objection.

Judge Smith: It will be marked Petitioner's Exhibit 3 and received in evidence.

(Trust instrument referred to marked Petitioner's Exhibit No. 3 and received in evidence.)

PETITIONER'S EXHIBIT No. 3.

This Agreement, made and entered into this 9th day of June, 1938, by and between Ben F. Stern-

(Testimony of Frank J. Brickwedel.)

Petitioner's Exhibit No. 3—(Continued)

heim, hereinafter referred to as "Trustor", and Wells Fargo Bank & Union Trust Co., a corporation organized and existing under and by virtue of the laws of the State of California, hereinafter referred to as "Trustee".

Witnesseth:

Whereas, certain life insurance policies have been or are about to be issued upon the life of the Trustor wherein said Trustee has been or will be designated as beneficiary, a list of which policies is attached hereto and marked Exhibit "A", and by reference made a part hereof; and

Whereas, the Trustor desires to provide for the collection and disposition of the proceeds of said policies by the Trustee; and

Whereas, the Trustor has transferred, assigned and set over unto the Trustee and does by these presents so transfer, assign and set over, all that certain personal property described and set forth in Exhibit "B" attached hereto and by reference made a part hereof; and

Whereas, the Trustor desires to provide the terms and conditions upon which said personal property shall be held by the Trustee;

Now, Therefore, in order to define the terms and trusts upon which the Trustee shall hold the said policies and the proceeds thereof, and shall hold the said property, it is agreed as follows, to-wit:

1. The Trustee shall not be obligated to pay any

(Testimony of Frank J. Brickwedel.)

Petitioner's Exhibit No. 3—(Continued)

premiums or assessments or make any other payments on said policies, and the Trustee shall have no obligation in respect to the said policies or other property held under the terms of this agreement except to the extent expressly agreed to herein.

2. Upon receiving proof of the death of the Trustor or that said policies have matured, the Trustee shall use its best efforts to collect and receive any and all sums of money payable thereunder, and may in its discretion institute any action at law or suit in equity for that purpose, but shall not be obligated so to do. The sums so collected shall become a trust fund or be added to any trust fund existing hereunder, and held, invested, and disposed of according to the provisions of this agreement.

3. Should the Trustee receive or collect the proceeds of said policies or any of them, or any dividends or payments thereon during the lifetime of the Trustor, the amount or amounts so received or collected shall be paid immediately by the Trustee to the Trustor, who may, however, by directions in writing instruct the Trustee to hold said proceeds as a trust fund subject to the provisions of this agreement.

4. The Trustee may receive any other property, real or personal, including the proceeds of other life insurance policies or other insurance policies, from the Trustor or from any other person or per-

(Testimony of Frank J. Brickwedel.)

Petitioner's Exhibit No. 3—(Continued)

sons, or under the last will and testament of the Trustor or of any other person or persons, to be held by the Trustee subject to the terms of this agreement.

5. During the lifetime of the Trustor, the Trustee shall not be obligated to make any payments on account of the real property constituting a part of the trust estate herein created, except that the Trustee shall from time to time during the continuance of the trust created herein collect the income from such real property.

2.

6. The Trustee shall have full power and authority (a) to hold and retain in its discretion any of the property coming into its possession hereunder in the same form of investment as that in which it is received by it (except that any moneys received by it hereunder to become part of a trust fund shall be forthwith invested in accordance with the terms hereof); (b) to exercise any right or option of subscription or otherwise which may at any time attach, belong, or be given to the holders of any stocks, bonds, securities, or other instruments in the nature thereof forming part of the trust estate, and to join in any plan of lease, mortgage, consolidation, reorganization, or foreclosure of any corporation, trust, or organization, or the property or assets thereof, including the deposit of bonds, securities, and stock with any bondholders',

(Testimony of Frank J. Brickwedel.)

Petitioner's Exhibit No. 3—(Continued)

stockholders', or protective committee in which the trust estate may hold stocks or bonds or other securities, and to take and hold any securities issued under such plan and to pay any assessments thereunder; (c) to enforce any mortgage or deed of trust or pledge held hereunder and to purchase at any sale thereunder any property subject thereto; (d) to purchase securities or property from and to make loans and advancements, secured or unsecured, to the executor or other representative of the Trustor's estate, without responsibility for any loss resulting therefrom; (e) to sell at public or private sale (for cash or on terms), improve, lease (without restriction or limit as to term), mortgage, convey in trust, pledge, hypothecate, transfer, exchange, compromise, surrender, or otherwise deal with the whole or any part of the trust property upon such terms and conditions as said Trustee in its discretion may deem advisable; (f) to hold any securities in bearer form or in the name of the

3.

trustee or of any nominee of the Trustee, and to exercise any of the foregoing powers through such nominee; (g) to invest and reinvest any of the trust property held hereunder in such amounts and in such property, real or personal, as the Trustee shall deem fit and proper, without being restricted to investments prescribed or authorized by law as trustees' investments.

7. The Trustee shall amortize any premium paid

(Testimony of Frank J. Brickwedel.)

Petitioner's Exhibit No. 3—(Continued)

in the purchase of bonds for the trust estate by setting aside so much of the income from each such bond purchased at a premium as shall be reasonably necessary to prevent diminution of the principal of the trust estate upon the redemption or payment of such bond. All stock dividends (other than those expressly stated by the declaring corporation to be out of current earnings) and amounts received upon the sale of Rights to Subscribe for stocks, or any profit accruing from the exercise of such Rights, shall be credited to principal and added to the trust estate and be held as a part thereof.

8. The Trustor shall have the power at any time during his lifetime by an instrument in writing delivered to the Trustee to modify, alter, revoke, or terminate this agreement in whole or in part and to withdraw any policies or to surrender the same for the surrender value thereof or for other policies or other insurance, or to borrow money thereon (and the Trustee is empowered to join in or execute any documents or releases required by any insurance company), or to withdraw or borrow money on the security of any other property which is subject to this trust agreement; provided, however, that, except as to revocation of this agreement or the withdrawal or surrender of policies or the borrowing of money thereon, or the withdrawal of or borrowing of money on any other property, the duties,

4.

powers, and liabilities of the Trustee hereunder

(Testimony of Frank J. Brickwedel.)

Petitioner's Exhibit No. 3—(Continued)

shall not be substantially changed without the written consent of the Trustee.

9. The Trustee may resign and discharge itself of the trust created hereunder during the lifetime of the Trustor, but such resignation shall not become effective until thirty (30) days after written notice is given to the Trustor by the Trustee, and in the event of the death of the Trustor during said thirty (30) day period said resignation shall be ineffective.

10. The Trustee shall hold the trust estate upon the following trusts and purposes:

(a) During the entire lifetime of the Trustor, the income from the trust estate shall be accumulated and added to the principal thereof, and upon the death of the Trustor, the Trustee shall pay the entire net income, revenue and profit therefrom to Blanche M. Sternheim, sister of the Trustor, for and during her natural lifetime, and upon the death of said sister of the Trustor or upon the death of the Trustor, whichever event shall last occur, the trust shall cease and terminate, and all of the trust estate remaining in the possession of the Trustee shall vest in and go to the following organizations and institutions:

Shriners Hospital for Crippled Children, of
San Francisco,

Mount Zion Hospital, San Francisco,

Community Chest, of San Francisco,

in portions and amounts to be decided in the sole,

(Testimony of Frank J. Brickwedel.)

Petitioner's Exhibit No. 3—(Continued)

uncontrolled and absolute discretion of the Trustee, upon considering the then existing needs of the aforesaid organizations and institutions.

5.

11. The Trustee shall have the power in its uncontrolled discretion to use and apply such part of the principal of the trust estate held for any beneficiary as it may consider suitable or necessary in the interest and for the welfare of such beneficiary in the event of sickness, accident, want, or other emergency of or to any of the beneficiaries then receiving the income from the trust estate or from any portion thereof; provided that, except as otherwise herein provided, not more than ten per cent (10%) of the principal of the trust estate shall be used or applied in any one year for said purposes or any of them.

12. All income or principal to be paid to any of the beneficiaries named herein shall be paid by the Trustee direct and only to said beneficiaries. The Trustee is not to recognize any transfer, mortgage, pledge, hypothecation, order, or assignment of any beneficiary, with the exception of the Trustor, by way of anticipation of any part of the income or principal. The principal and income of the trust estate shall not be subject in any manner to transfer by operation of law unless otherwise herein provided, and shall be exempt from the claims of creditors or other claimants and from orders, de-

(Testimony of Frank J. Brickwedel.)

Petitioner's Exhibit No. 3—(Continued)

crees, levies, attachments, garnishments, and executions, and other legal or equitable process or proceedings to the fullest extent permissible by law.

13. The Trustor hereby agrees to indemnify the Trustee for and save it harmless from, and the Trustee at all times shall have a lien upon the entire trust property and income for its reimbursement for or the payment of all costs, damages, expenses, fees, judgments, taxes, assessments, and liabilities which it may incur or pay or be compelled to pay or for which it may become liable or answerable by reason of its acceptance of this trust

6.

or in connection with its holding title to or its management of the trust property, and particularly for all thereof due to injury to person or property by or upon or in connection with any real property which may be held hereunder, or which may pertain to any policy or stock or security held hereunder, and whether or not any legal action shall be commenced or any judgment obtained with respect thereto.

14. This agreement shall be controlled by the laws of the State of California, and for its ordinary services hereunder it is understood and agreed that the Trustee shall receive annually: five-sixteenths of one per cent ($5/16$ ths of 1%) of the fair value of the corpus of the trust fund, provided, however, that as to such part of the corpus of a value in

(Testimony of Frank J. Brickwedel.)

Petitioner's Exhibit No. 3—(Continued)

excess of fifty thousand dollars (\$50,000) the annual compensation of the Trustee in respect to such part of the corpus shall be one-quarter of one per cent ($1/4$ of 1%) of the fair value in excess of fifty thousand dollars (\$50,000); provided further that as to cash deposited and held in savings accounts the annual compensation of the Trustee shall be one-twentieth of one per cent ($1/20$ of 1%); provided further that no compensation shall become payable with respect to life insurance forming part of the trust estate unless and until collection shall be made of the proceeds thereof; provided further that, notwithstanding any of the foregoing provisions, such annual fee of the Trustee shall not be less than Twenty-five Dollars (\$25.00). If the trust shall in any manner otherwise than by revocation terminate in whole or in part, then upon such termination said Trustee shall be entitled to receive as additional compensation one per cent (1%) of the fair value of the property as to which the trust shall have been terminated. Should this trust be revoked in whole or in part, said Trustee shall be entitled to a reasonable fee for its services hereunder. In the event that it becomes necessary

7.

for the Trustee to perform extraordinary services hereunder or to engage legal services, said Trustee shall be allowed a reasonable fee for said extraordinary services and also a reasonable fee in addi-

(Testimony of Frank J. Brickwedel.)

Petitioner's Exhibit No. 3—(Continued)
tion for its counsel, payable, as it may deem proper, wholly or partly from the principal or income of the trust estate or from both.

In Witness Whereof, the parties hereto have executed these presents on the day and year first above written.

BEN F. STERNHEIM

Trustor

WELLS FARGO BANK &
UNION TRUST CO.,

Trustee,

By F. J. BRICKWEDEL

Vice-President

By R. J. SCHRADER

Trust Officer

Approved as to form for trustor:

HELLER, EHRMAN, WHITE
& McAULIFFE

By LOUIS HEILBRON

[Endorsed]: T.C.U.S. Filed Feb. 2, 1943.

8.

By Mr. Baker:

Q. Mr. Brickwedel, what is the present value of the assets in the trust created by Ben Sternheim during his lifetime?

A. The value as of January 18, 1943, was \$86,779.67.

(Testimony of Frank J. Brickwedel.)

Q. What is the gross income from that trust estate?

A. The gross income is \$2,686.25 annually.

Q. And what is the net income?

A. \$2,411.25. [46]

Q. May I see that list of assets you have there?

A. (Handing document to Mr. Baker): Yes.

Q. Mr. Brickwedel, I show you a document which purports to list the assets of the estate or of the trust created by Ben Bernheim. I will ask you if that document sets forth fully and correctly the assets now held or held on January 26, I should say, 1943, in that trust estate?

A. (Examining document): Yes, if we take into account the pencil notations at the foot with respect of the cash on hand.

Q. Yes, the pencil notations show the cash that is now on hand. A. That is right.

Mr. Baker: Well, let the record show that this document which is about to be introduced in evidence or offered in evidence purports to set forth fully the assets of that trust created by Ben Sternheim as of January 26, 1943.

By Mr. Baker:

Q. Mr. Brickwedel, these assets as so shown on this document were the assets upon which that valuation which you just gave is based, is that correct? A. That is right.

Mr. Baker: I will offer this in evidence as Petitioner's exhibit next in order. [47]

Mr. Horrow: No objection.

(Testimony of Frank J. Brickwedel.)

Judge Smith: The document will be marked Petitioner's Exhibit 4 and received.

By Mr. Baker:

Q. Now, Mr. Brickwedel, just so that the picture can be complete on that trust, the estate, as you have testified, consisted of life insurance, at the date of the death of the decedent it consisted of the proceeds of the life insurance plus the savings accounts.

Did you then proceed to invest the sums in securities?

A. Yes, sir.

Q. And as of today the exhibit just offered in evidence represents all those securities in which you have invested those sums?

A. Of course, some securities were sold during the course of the administration.

Q. Yes, and reinvested. Some were reinvested?

A. That is right.

Q. Mr. Brickwedel, to your knowledge, on June 25, 1929, did Blanche Sternheim, the sister of Ben F. Sternheim, create a trust naming her brother as trustee?

A. On July 25, 1939, such a trust was created.

[48]

Q. Now, is Wells Fargo Bank & Union Trust Co. now the substitute trustee of that trust?

A. It is, subject to a certain amendment that was made.

Q. Yes. Do you have the date of that amendment, Mr. Brickwedel?

(Testimony of Frank J. Brickwedel.)

A. Dated the 31st of July, 1940.

Q. Is that the amendment that you speak of (handing document to the witness)?

A. (Examining document): Yes, and there was an amendment also made on September 12, 1940.

Q. The amendment dated the 25th of July, 1940, entirely modified the terms of the trust, the original trust?

A. To a very large extent.

Q. Mr. Brickwedel, I show you a document which purports to be an amended trust agreement created by Blanche Sternheim in which Wells Fargo Bank & Union Trust Co. is the substitute trustee and ask you if that document is a full, true, and correct copy of the amended trust agreement of Blanche Sternheim?

A. (Examining document): That is so except as to signatures and except as to the trustee. Mr. Kahn was named as successor trustee.

Q. Mr. Kahn was the first successor trustee, was he? [49]

A. Yes.

Q. And then you succeeded Mr. Kahn, is that right?

A. Yes, sir.

Q. You are now acting as trustee pursuant to the terms and provisions of this amended trust agreement?

A. And subject to the terms of the subsequent amendment.

Mr. Baker: Yes. For the record I will state, your Honor, that the original agreement dated the 25th day of July 1929—and this has been discussed with Mr. Horrow—was entirely superseded by this

(Testimony of Frank J. Brickwedel.)

amended trust agreement which I am now about to offer in evidence, that subsequent to the 3rd day of July, 1940, and on the 12th day of September 1940 another amendatory agreement was executed which, however, has no bearing at all upon the issues here and would only complicate the record if we introduced it. It was amended in a very minor way.

I will offer this document in evidence as Petitioner's Exhibit next in order.

Mr. Horrow: No objection.

Judge Smith: It will be marked Petitioner's Exhibit 5 and received in evidence.

(Amended trust agreement referred to marked Petitioner's Exhibit No. 5 and received in evidence.)

PETITIONER'S EXHIBIT No. 5

AMENDED TRUST AGREEMENT

July

This Agreement, made this 31st day of ~~June~~, 1940, between Blanche M. Sternheim (a single woman), formerly known as Blanche Sternheim Altmayer, of the City and County of San Francisco, State of California, herein called the "Trus-tor", and Max Kahn, as trustee under the trust agreement of July 25, 1929, herein called the "Trustee".

Witnesseth:

That Whereas, on the 25th day of July, 1929, the Trustor entered into an agreement with Benjamin

(Testimony of Frank J. Brickwedel.)

Petitioner's Exhibit No. 5—(Continued)

F. Sternheim, her brother, therein called the trustee, wherein and whereby Trustor granted, transferred, and set over to her said brother all of her property with the exception therein stated, said trust property consisting entirely of personal property, to-wit, stocks, bonds, and cash, which had already been in his possession and commingled with his own property, to have and to hold the same as trustee upon the trusts therein specified during the natural life of the Trustor; and said trustee thereupon entered upon the performance of the duties of said trust and continued to hold possession of her said property and performed the duties of his trust, until the time of his death; and

Whereas, said Benjamin F. Sternheim died on the 9th day of April, 1940, and such proceedings were thereafter duly had and taken in the Superior Court of the State of California in and for the City and County of San Francisco, in the matter of his estate that the Wells Fargo Bank & Union Trust Company, of San Francisco, was appointed and is now acting as executor of his will; and

Whereas, said deceased trustee, as permitted by said trust agreement, thereafter continued to commingle the trust property with his own property, so that some or all of same stood, and still stands, in his name and cannot be distinguished from his own property, and so held the same until his death, and said property is now in the possession of said bank as executor of his will or as depositary of the trust funds as below set out; and

(Testimony of Frank J. Brickwedel.)

Petitioner's Exhibit No. 5—(Continued)

Whereas, after the death of said Benjamin F. Sternheim, such proceedings were duly and regularly had and taken in the said Superior Court in the matter of the application of Blanche M. Sternheim, formerly known as Blanche Sternheim Alt-mayer, for appointment of a trustee to fill the vacancy caused by the death of said trustee, and for the appointment of a depositary of the property of the estate, said proceeding being numbered 249,942 in the civil files of said court, that on the 9th day of May, 1940, the above-named Max Kahn was appointed trustee of said trust to fill said vacancy, and thereafter duly qualified as such trustee, and thereupon became and has since continued to be and now is the duly appointed, qualified, and acting trustee of said trust, and said bank became and now is the depositary of the property of said trust estate; and

Whereas, Trustor in said trust agreement of July 25, 1929, reserved to herself the right to modify or alter the same with the agreement of the Trustee, and is desirous of modifying and altering said trust agreement in the particulars hereinafter set forth and the trustee has consented to said modifications and alterations;

1.

Now, Therefore, in consideration of the premises it is agreed that said trust agreement be and the same hereby is modified, altered, and amended so as to read as follows:

The Trustor hereby grants, transfers, and sets

(Testimony of Frank J. Brickwedel.)

Petitioner's Exhibit No. 5—(Continued)
over to said Trustee all of her property, consisting of stocks, bonds, and cash, said property being, as hereinbefore set forth, in the possession of the Wells Fargo Bank & Union Trust Co., of San Francisco, California, as executor of the will of Benjamin F. Sternheim, deceased, or as depositary appointed by the court of the property of the trust.

To have and to hold the same unto the said Trustee, nevertheless, for the following uses and purposes:

(1) The Trustee shall have full power and authority (a) to hold and retain in its discretion any of the property coming into its possession hereunder in the same form of investment as that in which it is received by it (except that any moneys received by it hereunder to become part of a trust fund shall be forthwith invested in accordance with the terms hereof); (b) to exercise any right or option of subscription or otherwise which may at any time attach, belong, or be given to the holders of any stocks, bonds, securities, or other instruments in the nature thereof forming part of the trust estate, and to join in any plan of lease, mortgage, consolidation, reorganization, or foreclosure of any corporation, trust, or organization, or the property or assets thereof, including the deposit of bonds, securities, and stock with any bondholders', stockholders', or protective committee in which the trust estate may hold stocks or bonds or other securities, and to take and hold any securities issued

(Testimony of Frank J. Brickwedel.)

Petitioner's Exhibit No. 5—(Continued)

under such plan and to pay any assessments thereunder; (c) to enforce any mortgage or deed of trust or pledge held hereunder and to purchase at any sale thereunder any property subject thereto; (d) to sell at public or private sale (for cash or on terms), improve, lease (without restriction or limit as to term), mortgage, convey in trust, pledge, hypothecate, transfer, exchange, compromise, surrender, or otherwise deal with the whole or any part of the trust property upon such terms and conditions as said Trustee in its discretion may deem advisable; (e) to hold any securities in bearer form or in the name of the trustee or of any nominee of the Trustee, and to exercise any of the foregoing powers through such nominee; (f) to invest and reinvest any of the trust property held hereunder in such amounts and in such property, real or personal, as the Trustee shall deem fit and proper, without being restricted to investments prescribed or authorized by law as trustees' investments.

Provided, however, that notwithstanding the powers herein given the Trustee in respect to the investment and reinvestment of trust funds and property, the Trustor reserves the right to employ Loomis, Sayles & Co., Inc. or other investment counsel to direct the investment and reinvestment of the funds and property of the trust. Until such employment the Trustee shall possess all of the powers herein given it; but upon such employment, Trustor shall and will at once notify the Trustee

(Testimony of Frank J. Brickwedel.)

Petitioner's Exhibit No. 5—(Continued)

thereof in writing, and thereafter and for the duration of such employment the powers of the Trustee in respect to such investment and reinvestment shall be suspended and the Trustee shall be governed by the advice of such investment counsel in all matters pertaining to their employment, and shall during such employment be relieved of all investment responsibility while acting in accordance with the

2.

advice of such counsel, and the Trustee shall comply with all of the directions of said Loomis, Sayles & Co., Inc. or such other investment counsel as may be employed by Trustor with respect to the investment and reinvestment of the trust estate irrespective of whether such directions may contemplate investment in hazardous, speculative or non-income bearing securities or property, and irrespective of whether the trustee shall deem the same prudent or whether the same shall be prudent under any standard of conduct applicable to trustees, and the trustee shall not be liable, accountable or responsible to any one whomsoever for so complying with such directions of said Loomis, Sayles & Co., Inc., or such other investment counsel.

(2) To pay to the Trustor monthly out of such trust property in the hands of the Trustee during the life of the trust thus created, the net issues, dividends, profits and income of the trust funds, forwarding the same to such address as is given in writing by the Trustor to the Trustee, or to deposit the same for the account of the Trustor in such

(Testimony of Frank J. Brickwedel.)

Petitioner's Exhibit No. 5—(Continued)

bank in the City and County of San Francisco as may be hereafter named in writing by the Trustee.

In case said net income payable to the Trustor shall in any calendar month after the date of this amended agreement be less than \$600.00, the Trustee shall, upon receipt of the written request of the Trustor, withdraw from the corpus of the trust property and pay to the Trustor a sufficient sum to make up the deficiency.

The Trustee shall, in addition to said \$600.00 a month, pay to the Trustor, upon receipt of her written request therefor, either at one time or from time to time, from the corpus of the trust property such sum or sums as Trustor shall demand, but not exceeding in any one calendar year 10% of the trust estate then in the hands of the Trustee or depositary.

In addition to the foregoing amounts, the Trustee shall have the power in trustee's uncontrolled discretion to use and apply such part of the principal of the trust estate held for Trustor as Trustee may consider suitable or necessary in the interest and for the welfare of Trustor in the event of sickness, accident, want, or other emergency of or to Trustor.

It is recognized that during the encumbency of the deceased Trustee, Trustor has received from the trust estate less than the net income of the trust estate therein provided to be paid to her, and it is provided that such unpaid net income shall be

(Testimony of Frank J. Brickwedel.)

Petitioner's Exhibit No. 5—(Continued)

added to and become a part of the principal of the trust, but only after withdrawing and paying to the Trustor absolutely therefrom the sum of \$

(3) The trust funds or property herein referred to or described shall be freely subject to disposition by the Trustor under the terms of her last will and testament executed by the Trustor in accordance with the laws of the State of California.

(4) The Trustee shall immediately take, and he is hereby given full and complete power and authority to take, such steps, by partition or otherwise, as may in his judgment be necessary to separate and segregate the property of the trust from that owned by the estate of said deceased trustee,

3.

and the same shall thereafter be held and kept separate and apart therefrom.

(5) The Trustor may add to such trust property and such trust funds from time to time and such additions shall be invested and disposed of according to the provisions of this agreement.

(6) All income or principal to be paid to any of the beneficiaries named herein shall be paid by the Trustee direct and only to said beneficiaries. The Trustee is not to recognize any transfer, mortgage, pledge, hypothecation, order, or assignment of any beneficiary, by way of anticipation of any part of the income or principal. The principal and income of the trust estate shall not be subject in any manner to transfer by operation of law unless otherwise herein provided, and shall be exempt from the

(Testimony of Frank J. Brickwedel.)

Petitioner's Exhibit No. 5—(Continued)

claims of creditors or other claimants and from orders, decrees, levies, attachments, garnishments, and executions, and other legal or equitable process or proceedings to the fullest extent permissible by law.

(7) The Trustee may resign and discharge himself of the trusts created hereunder during the lifetime of the Trustor, but such resignation shall not become effective until thirty (30) days written notice is given to the Trustor by the Trustee. Such discharge shall not release the Trustee from liability for any acts of misconduct or negligence by him in the management of the trust.

In the event that the Trustee shall at any time be unable or unwilling to continue to act as such, or shall resign, the Trustor hereby nominates the Wells Fargo Bank & Union Trust Company, of San Francisco, to act as such trustee in his place and stead, and in case said bank shall be unable or unwilling to act as such Trustee, she reserves the right to designate and appoint any bank to act as such trustee, and in any such case, upon the notification of such bank in writing of her appointment of it as trustee and the acceptance in writing of the appointment by such bank, such bank shall thereupon become trustee of the said trusts and entitled to receive the property of the trust and hold it under said trust agreement of July 25, 1929, as amended hereby.

(8) The Trustor hereby agrees to indemnify the

(Testimony of Frank J. Brickwedel.)

Petitioner's Exhibit No. 5—(Continued)

Trustee for and save it harmless from, and the Trustee at all times shall have a lien upon the entire trust property and income for its reimbursement for or the payment of all costs, damages, expenses, fees, judgments, taxes, assessments, and liabilities which it may incur or pay or be compelled to pay or for which it may become liable or answerable by reason of its acceptance of this trust or the connection with its holding title to or its management of the trust property, and particularly for all thereof due to injury to person or property by or upon or in connection with any real property which may be held hereunder, or which may pertain to any policy or stock or security held hereunder, and whether or not any legal action shall be commenced or any judgment obtained with respect thereto.

(9) The Trustee shall amortize any premium paid in the purchase of bonds for the trust estate by setting aside so much of the income from each such bond purchased at a premium as shall be reasonably necessary to prevent diminution of the principal of the trust estate upon the redemption or payment of such bond. All stock dividends (other than

4.

those expressly stated by the declaring corporation to be out of current earnings) and amounts received upon the sale of Rights to subscribe for stocks, or any profit accruing from the exercise of such Rights shall be credited to principal and added to the trust estate and be held as a part thereof.

(10) Upon the death of the Trustor, intestate,

(Testimony of Frank J. Brickwedel.)

Petitioner's Exhibit No. 5—(Continued)

or if any will left by her shall be or be adjudged invalid, the Trustee shall pay and distribute the trust estate in trustee's hands with approximate equality to ten worthy charities, to be selected by the trustee in his uncontrolled discretion without regard to religious character, but with particular regard to need and worthiness, eliminating so far as may be found feasible, in the interest of avoiding duplication, the charities provided for in the will of Trustor's brother, Benjamin F. Sternheim.

(11) This agreement shall be controlled by the laws of the State of California; and if and when said Wells Fargo Bank & Union Trust Company, or any other bank shall act as Trustee hereunder, such bank, for its ordinary services hereunder as such Trustee shall receive annually; five-sixteenths of one per cent ($5/16$ th of 1%) of the fair value of the corpus of the trust fund, provided, however, that as to such part of the corpus of a value in excess of Fifty Thousand Dollars (\$50,000.00) the annual compensation of the Trustee in respect to such part of the corpus shall be one-quarter of one per cent ($1/4$ of 1%) of the fair value in excess of Fifty Thousand Dollars (\$50,000.00); provided, further, that as to cash deposited and held in savings accounts the annual compensation of the Trustee shall be one-twentieth of one per cent ($1/20$ of 1%); provided, further, that notwithstanding any of the foregoing provisions such annual fee of the Bank Trustee shall not be less than

(Testimony of Frank J. Brickwedel.)

Petitioner's Exhibit No. 5—(Continued)

\$25.00. Upon the termination of this trust, in whole or in part, said bank Trustee shall be entitled to receive as additional compensation one per cent (1%) of the fair value of the property as to which the Trust shall have been terminated. In the event that it becomes necessary for the Bank Trustee to perform extraordinary services hereunder or to engage legal services, said Bank Trustee shall be allowed a reasonable fee for said extraordinary services and also a reasonable fee in addition for its counsel, payable, as it may deem proper, wholly or partly from the principal or income of the trust estate or from both.

(12) The Trustor reserves to herself the right to modify or alter this trust upon thirty (30) days written notice first given to the Trustee, but no modification or alteration hereof shall be valid unless agreed to in writing by the Trustor and the Trustee.

(13) This trust agreement is to remain in force and effect during the life of the Trustor, and shall be irrevocable.

In Witness Whereof, the parties have herewith set their hands the day and year first above written.

Executed in Triplicate.

Trustor

Trustee

5.

[Endorsed]: T.C.U.S. Filed Feb. 2, 1943.

(Testimony of Frank J. Brickwedel.)

By Mr. Baker:

Q. Mr. Brickwedel, how much income is Blanche Sternheim entitled to receive per month pursuant to the terms and provisions of the trust agreement, the trust created by her?

A. Well, by the terms of the instrument dated July 31, 1940, she is entitled to receive \$600 per month.

Q. How was that payable, out of what fund is that payable?

A. Payable first out of income and if income should not be sufficient then resort could be had to the corpus of the trust.

Q. Is she entitled to any other payments from this agreement?

A. Yes, additional, upon receipt of written request therefor the trustee would be required to pay her additional sums but not exceeding in any one calendar year ten per cent of the trust estate.

Q. Is she entitled to anything further in the discretion of the trustee?

Mr. Horrow: I take it the witness is reading provisions from the trust agreement which is in evidence?

Mr. Baker: Yes, Mr. Horrow.

Mr. Horrow: I am making no objection because I assume that the agreement will speak for itself.

Mr. Baker: Yes, it is the best evidence. I thought it might be a good idea simply to get it before his [51] Honor at this time, that is all. I admit it is irregular.

(Testimony of Frank J. Brickwedel.)

A. Yes, sir. "In addition to the foregoing amounts the trustee shall have the power in the trustee's uncontrolled discretion to use and apply such part of the principal of the trust estate held for the trustor as the trustee may consider suitable or necessary in the interest and for the welfare of trustor in the event of sickness, accident, want, or other emergency of or to trustor."

By Mr. Baker:

Q. Mr. Brickwedel, what is the present value of the assets of this trust created by Ben Sternheim?

A. The value of January 18th was \$138,745.20.

Q. What is the annual gross income from this trust? A. \$7,803.55.

Q. What is the annual net income?

A. Approximately \$7,303.55.

Q. I show you a document, Mr. Brickwedel, which purports to set forth the assets now held by the bank as trustee of the Blanche Sternheim trust and ask you if that sets forth fully and correctly the assets now held by the trustee in that trust.

A. (Examining document) As of January 18, 1943, it does.

Q. As of January 18, 1943. The valuation of the assets in this estate which you gave a few minutes ago is [52] based upon the assets as set forth in this document, is that correct?

A. It is.

(Testimony of Frank J. Brickwedel.)

Mr. Baker: Yes. I will offer in evidence the document purporting to set forth a list of the assets in the Blanche Sternheim trust as Petitioner's Exhibit next in order.

Mr. Horrow: No objection.

Judge Smith: It will be marked Petitioner's Exhibit 6 and received.

Judge Smith: I think we might have a five-minute recess at this time.

Mr. Baker: Yes, your Honor.

(A short recess was taken.)

By Mr. Baker:

Q. Mr. Brickwedel, do your records show the ages of Blanche Sternheim, Helen Opet, Lena Kohlman, Carrie Blattner, and Julius Fleischer?

A. They do.

Q. And what was the source of your information with regard to their ages?

A. The source of our information was a letter relating to the last will of Ben F. Sternheim which he addressed [53] to our bank.

Q. And what does he show to be the ages of these beneficiaries?

A. Well, an excerpt from his letter is as follows:

"The ages at present, 1938, of the beneficiaries in my will are as follows: My sister, Blanche M. Sternheim, is 58; Cousin Carrie Blattner, is 71; Cousin Julius Fleischer, is 69; Cousin Lena Kohlman, is 72; and my lifelong friend, Helen M. Opet is 59."

(Testimony of Frank J. Brickwedel.)

Q. And that was as of June 1938?

A. That is right.

Mr. Baker: Your Honor, we only have the exact birthdays of two of these beneficiaries which I have ascertained and Blanche Sternheim, of course, is not a beneficiary of the estate proper; she is only a beneficiary of the revocable trust. The date of her birth was April 24, 1880. Miss Opet, who is the only present resident of San Francisco among the beneficiaries of the estate proper, was born on December 22, 1879. As to the others, we just have to rely upon the date or the birth of their ages as given by the decedent in 1938.

Mr. Horrow, for the purpose of the record and, of course, subject to your objection, if you wish to make it, or to your legal argument later, I wish to introduce the [54] figures in connection with a matter I stated in my opening statement, that is, the amount which was actually charged to the living trust on account of these income taxes which were paid after the death of the decedent.

Mr. Horrow: Yes. We can stipulate, I believe, as to the amount paid.

Mr. Baker: From the living trust.

Mr. Horrow: Yes, from the living trust. Also, I think we can stipulate that those amounts were \$5,408.15 covering the principal amount of income tax and interest accrued up to the death of Ben F. Sternheim in the amount of \$3,591.01 making a total of \$8,999.16.

Mr. Baker: So stipulated.

(Testimony of Frank J. Brickwedel.)

Mr. Horrow: And will it be stipulated that that amount was paid out of the corpus of the trust?

Mr. Baker: So stipulated.

And then will it be stipulated, Mr. Horrow, that in effecting the settlement for contribution purposes between Blanche Sternheim and the Estate of Ben Sternheim that the estate paid an additional \$2,000 over and above the two-third-one-third ratio, in other words, the two-thirds-one-third ratio was not exactly accurate; the bank paid \$2,000 more?

Mr. Horrow: Yes, I think we should stipulate that the Sternheim Company, whose tax was in controversy [55] after the death of Ben F. Sternheim, deceased, was owned one-third by Blanche Sternheim and two-thirds by the decedent at the time of its liquidation, further, that the amounts which we have stipulated as additional allowance in respect to the income tax liability of the corporation represented two-thirds of the liability, and that in addition to that amount the estate paid \$2,000 which was applied against the income tax liability of the corporation.

Mr. Baker: And which came out of the corpus of the estate?

Mr. Horrow: Yes, came out of the residue of the estate of Ben F. Sternheim.

Mr. Baker: Yes. It is those two amounts, your Honor, with respect to which we are in disagreement as to whether they can be allowed to reduce the value of the estate for estate tax purposes.

(Testimony of Frank J. Brickwedel.)

Mr. Horrow: Yes, we have stipulated to that.

Mr. Baker: Yes, so stipulated.

By Mr. Baker:

Q. Mr. Brickwedel, referring to the clause in the will of Ben Sternheim—I don't know what number that is. I think it is one.

The Clerk: One.

By Mr. Baker:

Q. Yes, the copy of which is Exhibit 1 of the [56] petitioner in evidence. Referring, as I stated, to the clause which has given rise to the major issue in this controversy which provides that the amount which the trustee may pay from the principal of the trust estate in the event of sickness, accident, want or other emergency shall be limited to ten per cent of the portion of the principal of the trust held for any beneficiary, would you please state to the court what value you, as the bank, Wells Fargo Bank & Union Trust Co. as trustees uses in any one year when making such payments in order to estimate the ten per cent to which any beneficiary would be entitled?

A. In operating under a provision in that form we would ascertain the value of the corpus as of the date on which a request was made of us for principal funds and we would add to that total value the amount of any principal payments we had previously made subsequent, however, to the last anniversary of the trust, and it would be that total sum of which we would ascertain ten per cent as the maximum that we could allow.

(Testimony of Frank J. Brickwedel.)

Q. If I may be permitted the irregularity of a hypothetical case, assume that the assets of this trust were worth \$100,000 at the date that it was set up, and assume that in the first year the beneficiary of that trust requested his full ten per cent or \$10,000, assume, so that the situation will be clear, that no fluctuation in value in [57] those assets occurs so that at the beginning of the next calendar year, the next anniversary of the trust and anniversary year the value of the estate was \$90,000, assume that the beneficiary made a request for the full amount to which he is entitled, what valuation would you use to ascertain the ten per cent to which he is entitled?

A. We would ascertain the value of the fund as of the date on which the request was made on us for moneys.

Q. Which in a hypothetical case would be——

A. Assuming no fluctuation it would be \$90,000.

Mr. Baker: Yes. That is all.

Judge Smith: Mr. Horrow?

Cross Examination [58]

Q. Now, referring to the inter vivos trust created by the decedent, the statement was made that some amount of approximately \$9,000 was paid out of that trust in partial satisfaction of the income tax liability of Sternheim Company.

You were familiar with that, Mr. Brickwedel?

A. Yes, sir.

Q. Under what authority was that payment made?

(Testimony of Frank J. Brickwedel.)

A. Well, we sought the advice of our counsel who told us that we had the power to compromise and that in the exercise of our power to compromise it would be proper for us to make that treatment of that amount in the settlement of the tax.

Q. Has any other payment been made out of the corpus of the trust up to the present time?

A. Yes. During the pendency of this tax controversy there were some payments made to Blanche Sternheim out of the corpus of that trust.

Q. Can you state the amount of those payments?

A. No, I don't have the detail here.

Mr. Baker: I have it in general, Mr. Horrow. In the first place there were some payments made even prior [59] to that time. I am testifying in a way but if you don't mind that I happen to know the facts on it.

Mr. Horrow: So far I have accepted all your statements, Mr. Baker.

Mr. Baker: In 1940 when Ben Sternheim died he was the trustee of the trust created by Blanche Sternheim. With the acquiescence of Miss Sternheim he had kept all of the assets of that trust commingled with his own. The result was that at the date of the death of Ben Sternheim it became necessary to disentangle the amounts which belonged to Blanche and the amounts which belonged to the Estate of Ben. Some difficulty was entailed in doing that, in agreeing who owned what. Finally an agreement was reached and the trust was set up for Blanche Sternheim under the docu-

(Testimony of Frank J. Brickwedel.)

ment which we have introduced in evidence. But during that time Blanche was in need of funds so that the sum of \$500 per month was paid to her under the emergency clause, as we call it, in the living trust created by Ben, \$500 per month for three months under an agreement with Blanche Sternheim that she would repay that sum, which she did.

Mr. Horrow: I will stipulate to that statement, your Honor.

Could you state, Mr. Baker, just when the \$500 per month was paid out of the corpus of the inter vivos trust? [60]

Mr. Baker: You mean those three that I was telling you about?

Mr. Horrow: Yes, the \$1500 you referred to.

Mr. Baker: It was paid shortly after the 9th day of April, 1940, the date of the death of Ben Sternheim, I should judge approximately in the months of May and June and July of that year. I can put Mr. Hack on the stand. Mr. Hack, I believe, has that information.

Mr. Horrow: Yes.

Well, I think I can stipulate to the statements made by counsel, your Honor. That is my understanding.

Mr. Baker: I am not certain that those months are exactly correct.

Mr. Horrow: At any rate, it was shortly after the date of death of decedent?

Mr. Baker: That is correct, under an agree-

(Testimony of Frank J. Brickwedel.)

ment that she would repay those amounts, which she did.

Mr. Horrow: Will you further stipulate that the payments were made under paragraph 11 of Petitioner's Exhibit 3?

Mr. Baker: Correct.

Mr. Horrow: That is under the so-called emergency clause which you referred to?

Mr. Baker: Yes. Then, as we have stated before, these income tax claims which were pressed by the government [61] likewise were pressed against this trust created by Blanche Sternheim with the result that the bank, as trustee, knowing that if we had to go to court on the thing and if the government had succeeded in pressing its claim to the utmost the liability would have been in excess of \$500,000 with the result that the Estate of Ben Sternheim would have been wiped out and with the result that the government would have had to have looked to that trust, which they were looking to anyway, and possibly eaten that up too. The bank froze those payments, and further payments to Blanche Sternheim under that trust.

Mr. Horrow: I will stipulate to that except I think it should be qualified, your Honor, by the statement that the Commissioner of Internal Revenue never made any determination of liability against the inter-vivos trust created for Blanche Sternheim.

Judge Smith: Created by her, you mean. Are

(Testimony of Frank J. Brickwedel.)

you talking about the trust created by Ben or the one created by Blanche?

Mr. Horrow: I am talking about the one created by Ben for Blanche.

Judge Smith: Yes.

Mr. Horrow: No deficiency notice was given to the trustee of that trust although deficiency notices were mailed asserting liability against the Estate of Ben F. [62] Sternheim, the trust created by Ben F. Sternheim or, rather, the trust created by Blanche Sternheim.

Isn't that correct, Mr. Baker?

Mr. Baker: You did send a deficiency notice to the trustee of the trust created by Blanche but did not do so as to the trustee of the trust created by Ben.

Mr. Horrow: That is correct; that is right.

Mr. Baker: Yes.

Mr. Horrow: There was never any formal determination of liability against the inter-vivos trust.

Mr. Baker: Then, since there was an assertion of liability against the trust created by Blanche all of her assets were in that trust. It is a trust amendable by her, as your Honor will see by looking at the document in evidence, but purports to be otherwise irrevocable although I am not so sure under the law that power to amend wouldn't give her the power to amend the provision to revoke. Anyway, that is a question. In any event, since the liability, since there was danger that even that trust created by Blanche against which the govern-

(Testimony of Frank J. Brickwedel.)

ment was asserting liability might be reached, the bank felt compelled to freeze all further payments out of that trust to Blanche, with the result that at that time we had no intimation that the government was even formally or informally making any claims against the Ben Sternheim inter-vivos trust and an agreement was [63] reached in order to supply Miss Sternheim with monthly payments to pay her, until the storm should subside, pursuant to the emergency clause in the Ben Sternheim trust the sum of \$500 a month which was done for some seven or eight months. I don't know the exact number of months. Mr. Hack I think can tell me.

Mr. Hack: I think \$325 from the principal of the trust, \$3600 in all.

Mr. Baker: In all we paid \$325 from the principal of that trust, Mr. Hack tells me, Wells Fargo Bank & Union Trust Co., and the total paid from principal was some \$3300.

Mr. Hack: Approximately \$3700.

Mr. Baker: Approximately \$3700 until such time as the income tax claim was settled.

Mr. Horrow: Well, now, just to get the record clear will you stipulate in respect to the matters that you referred to?

Mr. Baker: Yes, I will so stipulate.

Mr. Horrow: I don't like to stipulate, your Honor, that the respondent ever made any claim against the inter-vivos trust. However the trustee or the parties involved may have felt about the matter the government never made any claim

(Testimony of Frank J. Brickwedel.)

against the inter-vivos trust although an amount was paid out of the corpus of that trust in [64] satisfaction of the liability that was in controversy at that time.

Mr. Baker: Except, Mr. Horrow, I definitely recall that in conferences had with you and other members of the technical staff there were statements to that effect, looking toward that inter-vivos trust. Now perhaps you don't recall that and will not want to stipulate to that fact, but I do recall that some statements were made with regard to the inter-vivos trust and its potential liability.

Mr. Horrow: I don't recall any assertion of any liability.

Mr. Baker: Well, I wouldn't ask you to stipulate to that if you don't. However, we did feel definitely the government would have looked toward that trust to satisfy its claim, if necessary, and that occasioned our subsequent conduct.

By Mr. Horrow:

Q. Now, Mr. Brickwedel, referring again to the inter-vivos trust, you stated that the gross income was approximately \$2500, is that correct?

A. I don't think that was the figure.

Mr. Baker: Do you mean the Ben Sternheim inter-vivos trust?

Mr. Horrow: I am referring to the inter-vivos trust created by Ben Sternheim. [65]

By Mr. Horrow:

Q. What was the annual gross income which you testified to?

(Testimony of Frank J. Brickwedel.)

Mr. Baker: I don't know whether Mr. Brickwedel has those figures with him.

A. No, I don't have them.

Mr. Baker: They may be in these documents in evidence.

Let the record show that I am handing Mr. Brickwedel Petitioner's Exhibit No. 4 in evidence.

The Witness (Examining document): It showed a gross income of \$2686.25 annually.

By Mr. Horrow:

Q. Was that an estimated sum or a sum actually received by the trust?

A. Well, that was the income that we anticipate will be received assuming that these assets are retained and that there is no default.

Q. In other words, it is simply an estimated amount of income? A. Yes, sir.

Q. Now, what has the income of the trust been since its inception, the income for each year? Do you have those figures?

A. I don't have those figures. [66]

Mr. Horrow: Do you have them?

Mr. Baker: I don't have them, Mr. Horrow.

Mr. Hack: Approximately \$2100 a year net.

Mr. Baker: I find from Mr. Hack of the bank, who is in direct touch with this, that it has been \$2100 a year net.

Mr. Horrow: Since the date of death?

Mr. Baker: Since the date of death, yes, sir.

Mr. Horrow: We will stipulate that the net income actually received by the trust since the date of death has been approximately \$2100 per year.

(Testimony of Frank J. Brickwedel.)

By Mr. Horrow:

Q. Now, as a matter of fact, Mr. Brickwedel, the corpus of the trust today is less than the corpus of the trust as it existed at the date of death?

A. (Affirmative nod.)

Mr. Baker: Your answer is "Yes," Mr. Brickwedel?

The Witness: Yes.

By Mr. Horrow:

Q. And the difference is approximately \$10,000, is that correct? A. A little more than \$7,000.

Mr. Horrow: Well, I think that arises over the difference as to the amounts in the trust as of the date of death, and I would like to offer in evidence the estate tax [67] return filed for the estate of Ben F. Sternheim as Respondent's exhibit.

Mr. Baker: No objection.

Mr. Horrow: It shows the amounts in the trust at the date of death, your Honor.

Judge Smith: It may be marked Exhibit A and received in evidence.

(Estate tax return referred to marked Respondent's Exhibit A and received in evidence.)

Mr. Horrow: That is all I have, your Honor.

Mr. Baker: I have no further questions.

(Witness excused.)

Mr. Baker: I will call Miss Blanche Sternheim.

Whereupon,

BLANCHE M. STERNHEIM

was called as a witness for and on behalf of the Petitioner, and having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Baker:

Q. Miss Sternheim, your full name is Blanche M. Sternheim, is it? A. Correct.

Q. And where do you reside, Miss Sternheim?

A. Hotel Californian. [68]

Q. What is your occupation?

A. Nothing. Well, I am not engaged in any work especially.

Q. What relation are you to the decedent, Ben F. Sternheim? A. A sister.

Q. You are the Blanche Sternheim who has been referred to continually throughout this proceeding? A. Yes, sir.

Q. Miss Sternheim, you are receiving income from two trusts in which Wells Fargo & Union Trust Co. is the trustee, are you not?

A. Well, I am now but I was not for a while.

Q. Yes, but you are now?

A. Well, only the last month or two.

Q. Since December? A. Yes, sir.

Q. Yes. And you did receive income from the trust which you created after the death of Mr. Sternheim in 1940? A. Yes.

Q. After there was a segregation of the assets?

A. Yes, sir.

(Testimony of Blanche M. Sternheim.)

Q. Up until approximately the first of the year 1942?

A. That is right. [69]

Q. Is that correct?

A. Yes, sir.

Q. At which time the income from the trust you created was shut off, is that correct?

A. Yes, sir.

Q. Now, out of the payments of income which you received from both of these trusts, which you have received, did you spend all of your income for your living expenses?

A. No, I did not.

Q. How much would you say on the average you have saved out of the income received per month?

A. Well, it approximately went from about \$250 to \$300 a month.

Q. And could you give an approximate estimate of what your average monthly living expenses are?

A. Well, at certain seasons of the year it is more than at others, but it is rather hard to tell always; it just depends. Do you mean just approximately?

Q. On the average, yes.

A. Well, if you don't buy anything and if you just pay your shelter and meals and things like that it would average, I would say, about \$300, if you don't buy anything.

Q. And sometimes it comes to more than that, naturally?

A. Well, naturally. That doesn't include any [70] professional services of any kind.

Q. And from your present knowledge of your wants and your needs, considering the income which you have received from this trust, would you be

(Testimony of Blanche M. Sternheim.)

able to estimate approximately how much in the future out of this income you would save, if any?

A. Well, providing there are no accidents or sickness or things like that, why, I could save about the same as I have been.

Q. That was between \$250 and \$300 a month?

A. Yes; sir.

Q. I see. And what is the state of your health, Miss Sternheim?

A. Well, it is very good outside of all this mental worry.

Mr. Baker: That is all.

Cross Examination

By Mr. Horrow:

Q. Miss Sternheim, immediately following the death of your brother did you make demands on the trustee of the bank for payments out of the——

A. No, I did not.

Q. Reference has been made to a sum of \$500 which was paid to you for three months following the death of your brother. Do you recall the circumstances of that? [71]

A. Well, that was an emergency when everything was tied up and my assets were involved in his until things were straightened out. I had no source of income other than that.

Q. How did you arrive at the amount of \$500?

A. Well, I am paying a certain amount at the hotel I live at, and my meals and things like that, and I am very economical, I am not throwing anything away at all.

(Testimony of Blanche M. Sternheim.)

Q. So then you consider that \$500 a month was exactly what you needed at the time those payments were made, isn't that correct?

A. Well, I probably save something out of it. It naturally would change according to what you would spend over an above your living and your shelter.

Q. But at any rate at the time you made a request for the payment of \$500 following the death of your brother you felt that you needed that much money for your care and your living expenses?

A. Well, at that time, yes.

Q. Now, at the time of the death of your brother were you receiving any medical care?

A. No, I was not.

Q. Are you at the present time?

A. I don't have doctors at all.

Q. You are very fortunate in that respect.

A. I am my own doctor. [72]

Q. Now, you are familiar with the terms of the trust which your brother created?

A. Yes, I am.

Q. You are familiar with the provisions relating to sickness or other emergencies?

A. Yes, yes.

Q. In the event any sickness or accident occurs is it your intention to demand that the trustee pay any sums that you consider necessary out of the profits of the trust?

A. I hope it won't be necessary. I hope I will stay well.

Q. Well, we hope so too, Miss Sternheim, but in

(Testimony of Blanche M. Sternheim.)

the event it becomes necessary is it your intention to make such request in accordance——

A. (Interposing): I think that is hard to say. If you should have an automobile accident or have to go to the hospital, I think those things are unforeseen. I hope I won't need anything like that.

Q. You would make such request, then, is that your answer?

A. I don't know. If I had enough income without it I suppose I wouldn't demand it.

Q. You hope that you won't demand it. But in the event it became necessary it is your intention to request [73] that sums be paid by the trustees?

A. Well, I wouldn't—— I couldn't say that because I am hoping that nothing will happen.

Mr. Horrow: Well, I think your Honor knows the situation.

Mr. Baker: Well, I don't think she has said that she would intend to do it. She said that if the income was sufficient she wouldn't do it.

The Witness: As far as I am going now I don't intend to draw on the principal unless it is very absolutely necessary.

Mr. Horrow: Is her age a matter of record?

Mr. Baker: Yes, it is a matter of record.

By Mr. Horrow:

Q. Do you have any dependents, Miss Sternheim?

A. No, I have none at all.

Mr. Horrow: That is all, your Honor.

[Endorsed]: T.C.U.S Filed Feb. 24, 1943. [74]

In the United States Circuit Court of
Appeals for the Ninth Circuit

Docket No. 111776

ESTATE OF BEN F. STERNHEIM, Deceased,
WELLS FARGO BANK & UNION TRUST
CO., Executor,

Petitioner on Review,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent on Review,

STATEMENT OF POINTS

Comes now Estate of Ben F. Sternheim, deceased, Wells Fargo Bank & Union Trust Co., Executor, the petitioner on review herein, by and through its attorneys F. M. McAuliffe and L. C. Baker, and hereby asserts the following errors on which it intends to rely in this review:

1. The Tax Court erred in holding and deciding that the estate is not entitled to a deduction from the decedent's gross estate in the amount of the full value of the remainder interest in charitable institutions created by the revocable inter vivos trust agreement.

2. The Tax Court erred in not holding and deciding that the estate is entitled to a deduction from the decedent's gross estate in the amount of the full value of the remainder interest in charitable institutions created by the revocable inter vivos trust agreement. [96]

3. The Tax Court erred in holding and deciding that the fact that payments were made from the corpus to the life tenant of the revocable inter vivos trust subsequent to the date of the death of the decedent, as the result of events which occurred subsequent to the date of the death of the decedent, disentitled the estate to a deduction from the decedent's gross estate in the amount of the full value of the remainder interest in charitable institutions created by the revocable inter vivos trust agreement.

4. The Tax Court erred in not holding and deciding that the fact that payments were made from the corpus to the life tenant of the revocable inter vivos trust subsequent to the date of the death of the decedent, as the result of events which occurred subsequent to the date of the death of the decedent, did not disentitle the estate to a deduction from the decedent's gross estate in the amount of the full value of the remainder interest in charitable institutions created by the revocable inter vivos trust agreement.

5. The Tax Court erred in entering its order of redetermination that there is a deficiency in the estate tax in the amount of \$16,450.04.

F. M. McAULIFFE,

L. C. Baker,

Counsel for Petitioner on
Review.

Service of the within statement of points is hereby admitted this 30th day of November, 1943.

J. P. WENCHEL, (C. A. R.)

Chief Counsel, Bureau of Internal Revenue,
Attorney for Respondent on Review.

[Endorsed]: T.C.U.S. Filed Dec. 14, 1943. (97)

[Title of Circuit Court of Appeals and Cause]

DESIGNATION FOR RECORD ON REVIEW

To the Clerk of the Tax Court of the United States:

You will please prepare, transmit and deliver to the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit copies duly certified as correct of the following documents and records in the above-entitled cause in connection with the petition for review by the said Circuit Court of Appeals for the Ninth Circuit, heretofore filed by the Commissioner of Internal Revenue:

1. Docket entries of the proceedings before the Board of Tax Appeals (now the Tax Court of the United States).

2. Pleadings before the Board:

(a) Petition, including annexed copy of deficiency notice;

(b) Answer.

3. Memorandum Findings of Fact and Opinion, and Decision of the Tax Court.

4. Petition for review, together with proof of service of notice of filing petition for review and of service of a copy of petition for review. [98]

5. Testimony of petitioner's witness Frank J. Brickwedel, pages 18 and 19 of the Official Report of proceedings before the Tax Court, excluding lines 1 to 10, both inclusive, of page 18 and lines 22, to 25, both inclusive, of page 19; pages 22 to 36, both inclusive, excluding lines 1 to 20, both inclusive, of page 22 and lines 15 to 25, both inclusive, of page 36; pages 46 to 55, both inclusive, excluding lines 1 to 3, both inclusive, of page 46;

Testimony of petitioner's witness Blanche M. Sternheim, pages 55 to 61, both inclusive, excluding lines 18 to 25, both inclusive, of page 61;

Petitioner's Exhibits 1, 3 and 5.

6. Statement of Points.

7. Any and all orders enlarging time for the preparation, transmission and delivery of the record.

[In pencil]: Not included in record.

8. This Designation for Record.

F. M. McAULIFFE,

L. C. BAKER,

Counsel for Petitioner on
Review.

14 Montgomery Street,
San Francisco 4, Calif.

Service of a copy of the within Designation is hereby admitted this 30th day of November, 1943, and agreed to:

J. P. WENCHEL, (C. A. R.)
Chief Counsel, Bureau of
Internal Revenue,
Counsel for Respondent on
Review.

[Endorsed]: T.C.U.S. Filed Dec. 14, 1943. [9]

The Tax Court of the United States
Washington

Docket No. 111776

ESTATE OF BEN F. STERNHEIM, Deceased,
WELLS FARGO BANK & UNION TRUST
CO., Executor,

Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

CERTIFICATE

I, B. D. Gamble, clerk of The Tax Court of the United States do hereby certify that the foregoing pages, 1 to 99, inclusive, contain and are a true copy of the transcript of record, papers, and proceedings on file and of record in my office as called for by the Praecipe in the appeal (or appeals) as above numbered and entitled.

In testimony whereof, I hereunto set my hand and affix the seal of The Tax Court of the United States, at Washington, in the District of Columbia, this 6th day of January, 1944.

[Seal]

B. D. GAMBLE,

Clerk, The Tax Court of the
United States.

[Endorsed]: No. 10662. United States Circuit Court of Appeals for the Ninth Circuit. Wells Fargo Bank & Union Trust Co., Executor of the Estate of Ben. F. Sternheim, deceased, Petitioner, vs. Commissioner of Internal Revenue, Respondent. Transcript of the Record. Upon Petition to Review a Decision of The Tax Court of the United States.

Filed January 17, 1944.

PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

In The United States Circuit Court of Appeals
for the Ninth Circuit

Docket No. 10662

WELLS FARGO BANK & UNION TRUST CO.,
Executor of the Estate of Ben. F. Sternheim,
deceased,

Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

DESIGNATION FOR RECORD ON REVIEW
AND STATEMENT OF POINTS

To the Clerk of the United States Circuit Court of
Appeals for the Ninth Circuit:

Pursuant to Rule 19 (6) of your Court, we hereby
set forth a statement of points of petitioner and a
designation of the parts of the record which we
think necessary for the consideration of the petition
for review of the decision of the Tax Court of the
United States, as follows:

1. Petitioner adopts in full the statement of
points filed in the Tax Court of the United States
and transmitted to you as part of the record in the
above entitled matter.

2. Petitioner adopts in full the designation for
record on review filed in the Tax Court of the
United States and transmitted to you as part of the
record in the above entitled matter, and in addition

thereto designates this designation for record on review as part of said record.

F. M. McAULIFFE,

L. C. BAKER,

Attorneys for Petitioner.

Service of a copy of the within designation and statement of points is hereby admitted this day of 1944.

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.....

Attorneys for Respondent.

[Endorsed]: Filed Jan. 21, 1944. Paul P. O'Brien, Clerk.